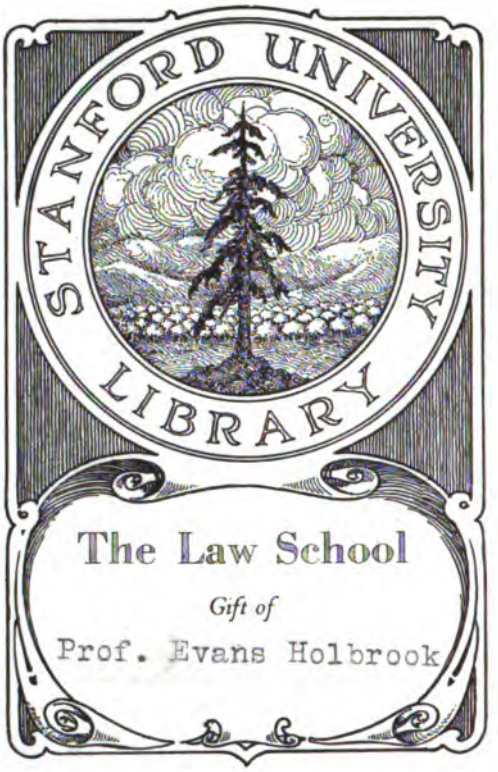
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TREATISE

ON THE

LAW OF ESTOPPEL

AND

ITS APPLICATION IN PRACTICE

BY

MELVILLE M. BIGELOW

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PREFACE.

THAT the law of estoppel should have been looked upon as an unprofitable subject, and left to develop itself in confusion, until recently, has come to be matter of common surprise. The reason may be sought, perhaps, in the subject itself, and in its former treatment by the courts. There is something forbidding in the very name "estoppel," producing a dread of investigation. The subject is looked upon as hard, and dry, and technical; and the courts have, in no small degree, confirmed the impression, by pronouncing it odious. A glance into Coke upon Littleton, and into some of the early Reports, will be sufficient to excite a feeling of wonder that any one could have been induced to attempt to explore and elucidate the subject.

No one has done so much for the law of estoppel as Mr. John William Smith; and to no one else is so much credit due for dispelling the notion that estoppels are odious. The spirit with which he approached the subject is admirable; and no words are more familiar to the lawyer's ear than those of the opening paragraph of his note to the case of the Duchess of Kingston. "Notwithstanding," he says, "the unpromising definition of the word 'estoppel' [by Coke], it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis*

litium; but if matters once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion."

The way was prepared by Mr. Smith for a text-book. The subject had been shorn of its repulsiveness; and its loose and scattered fragments, so far as they were to be found in England, had been collected and presented in an attractive outline. Much good must have resulted from a thorough systematic treatise on the law of estoppel at this time. Not to speak of the benefit to the practitioner, it would have prevented and removed many of the conflicts which a glance over the pages of the Introduction will show are unusually numerous. But a writer did not yet appear; and the justly celebrated note of Mr. Smith has met the common fate of other worthy legal productions. To make it a full depository of the law, it has been disjointed with so many unsightly brackets, and interlarded so much, that its original form and beauty have been well-nigh obliterated; and it has been so encumbered in the American editions by heavy sub-notes, that, withal, what was at first a forcible and readable outline of the law has come to be a mere collection of a multitude of points.

No reflection is intended upon the labors of the editors of Mr. Smith on either side of the Atlantic. Their efforts have been eminently commendable and successful; but granting this does not affect the fact intimated, that their additions are heavy and tedious. Notes, as such, can never fill the place of a text-book, and especially when they occupy the space of a hundred pages. The profession will not venture in the small types longer than may be necessary to find a few references to cases for present need.

A text-book on estoppel was, therefore, quite as desirable after the latest editions of Smith's Leading Cases as ever; and the continually increasing calls for such a work

by the profession confirmed the fact, and led to the preparation of this volume.

Hardly had the work been undertaken when the treatise by Mr. Herman was announced; but on consultation with the publishers of this volume, it was thought best to go on with the work, and the result is now presented to the profession.

The internal difficulties of the subject, consisting mainly in the numerous conflicts of authority, had considerable influence in deciding upon the plan adopted, of presenting the leading principles of estoppel through short reports of the cases. The announcement of other works on the subject contributed somewhat to the same result. But the prevailing motive was the conviction of its advantages. The author's studies have for several years past been directed mainly to the decisions of the courts; and he has become convinced that this study of the cases vastly promotes an acquisition of legal principles.

The advantages resulting from presenting the subject in the manner of its development will readily suggest themselves. 1. It removes the liability to error which prevails in the attempt to state merely the principles established by the cases, — a matter of no slight importance, especially to those who have not ready access to the Reports. To such, a work carefully prepared upon this plan may in some degree supply the place of the absent Reports. 2. The plan has also this advantage, that it shows how the principles have been derived and moulded, and the reasons upon which they are based; and the result is, that more permanent impressions are made upon the memory.

Of the details of the plan, it may be well to state, that the arrangement of topics has been made to depend upon the legal principle involved, and not upon the name of the subject in which the principle may have happened to arise. Thus, whether a corporation is estopped to deny the truth

of a representation made and acted upon is to be ascertained by examining the chapter on Estoppel by Conduct, and not the chapter on Corporations; but if the question be whether a corporation may set up the invalidity of its organization, in an action upon one of its contracts, the chapter then to be consulted is that on Corporations, for the question is one peculiar to that subject.

Points of conflict in the law have been examined with care, and with an earnest endeavor to remove some of the difficulties presented. If the attempt has been successful to any considerable extent, this will be held a high reward for the labor.

A number of precedents in pleading have been collected, and placed in the last chapter of the text. They will be of value, even where the common-law practice does not prevail, in indicating the evidence requisite to support the estoppel.

Without desiring to cite every case that has been reported, it has been the author's intention and endeavor to cite a sufficient number of authorities to establish the propositions stated, and to present every point in the law of estoppel that has been adjudicated, down to the latest moment. Farther than this, the text has not been encroached upon. The work of Mr. Herman has been of service in affording the author an opportunity to ascertain whether any cases have been omitted upon points not already presented; and cheerful acknowledgment is made of the fact. The citations have all been verified; and the hope is indulged that few errors have escaped correction.

An Introduction to the text has been written, in which a general outline of the subject has been sketched. The idea was suggested by the Introduction of Mr. Adams to his Treatise on Equity, which is one of the most attractive and useful features of that excellent work. The chapter may be of service to the practitioner, as well as to the student, for whom it is more particularly intended, in

facilitating an acquaintance with the plan and order of arrangement of the text, thus obviating, to some extent, the necessity of continual reference to the Index.

The following corrections should be made: The case of Way *v.* Arnold, 18 Ga. 181, should be cited as the decision referred to in the paragraph beginning at the foot of p. 357. In the first line of the middle paragraph on p. 433, the word "drawer" should read *drawee*, or, better still, *acceptor*. The last word in the 7th line, p. 598, should be *where*, instead of "when." Add to the cases cited in note 1, p. 607, Finnegan *v.* Carahar, 61 Barb. 252.

BOSTON, July 20, 1872.

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INTRODUCTION.

THE historical origin of the main divisions of estoppel is separated by three long and somewhat indefinite periods, which may be termed the ancient, middle, and modern. To the first belongs the doctrine of *Res Judicata*, which comes to us from the Roman law;[1] to the second belong the doctrines of Estoppel by Deed, and of Estoppel *in Pais* as it existed prior to, and in the time of, Lord Coke;[2] to the third belongs the modern doctrine of Estoppel *in Pais*.[3] No definite limits can be assigned, as has been intimated, to the origin of either of these branches of estoppel. The first is found in all books of the Roman law, in some form; the second is found in the earliest collections of the English law;[4] while the third has grown up within a century.[5]

Estoppels for a long time were considered as odious; and the courts have not yet altogether ceased to apply the term to them. The definition given by Lord Coke has often been referred to as giving ground for the application of the term. He said that the name "estoppel" or "conclusion" was given "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[6] The definition was certainly not a happy one; and if it were altogether correct, the doctrine of estoppel might well be regarded as odious. It seems to be true, however, that in Coke's day the doctrine was not favored, and because it was often used to shut out the truth, against reason and good policy.[7]

In modern times the doctrine has lost its odium, and become

[1] *Post*, pp. 7 *et seq.*

[2] *Post*, pp. 370, 372.

[3] Ibid.

[4] Statham's and Fitzherbert's Abridgments, and Year-Books, *temp.* Edw. 2, *annis* 1307–1326. These are the earliest printed volumes of the Year-Books, except three of the reign of Edw. 1. In those, the title "Estoppel" is not indexed.

[5] *Post*, p. 373.

[6] Coke Litt. 352 a.

[7] Note to Duchess of Kingston's Case, 2 Smith's L. C. 693, 6th Eng. ed.

one of the most important, useful, and just agencies of the law. It is quite safe to say, that, at the present day, it is never employed to exclude the truth; its whole force and effect are to preclude parties, and those in privity with them, from unsettling a matter which they have, in solemn form, admitted and adopted. A person's admission, made in either of three ways, is considered as conclusive of the fact as to him and his privies, and they will not be permitted to dispute its truth; not on the ground, indeed, that the admission is true, but because to allow its correctness to be disputed is contrary either to sound policy or to good morals.

Certain admissions, then, are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded. Such admissions are those which arise by matter of record, or of deed, or *in pais*.

There is a twofold estoppel arising by matter of record, i. e. from the proceedings of the courts: First, in the record considered as a memorial or entry of the judgment; and, secondly, in the record considered as *res judicata*. In the first case mentioned, the record has a conclusive effect upon all the world. It imports absolute verity, not only as against the parties to it and those in privity with them, but against strangers also; and no one may produce evidence to impeach it.[1]

The estoppel of a record as *res judicata* is of greater importance. The force and effect of a judgment depends, first, upon the nature of the proceeding in which it was rendered, i. e. whether it was an action *in rem* or *in personam;* and, secondly, upon the forum in which it was pronounced, — that is, whether it is a judgment of a domestic or of a foreign court.

A judgment *in rem*, properly speaking, is one which determines the *status* of a person or thing; and its peculiarity is, that it is conclusive upon all persons.[2] Proceedings in attachment, replevin, and the like, are sometimes mentioned as proceedings *in rem*, but not with accuracy. The judgment in these cases binds only parties and privies, — not strangers also.[3]

[1] *Post*, pp. 1 – 6. [2] *Post*, p. 12. [3] *Post*, p. 11.

Judgments *in personam* are those which bind only the parties to the proceeding, and those in privity with them. They have ordinarily no effect as to third persons.[1]

From this explanation we pass to some of the general features of judgments common to these divisions.

In order to work an estoppel, and preclude the parties from relitigating questions once adjudicated, the judgment must have been rendered by a legally constituted court.[2] This conclusiveness has, however, sometimes been extended to the decrees of tribunals other than the ordinary public courts of justice. A college sentence of expulsion was held conclusive in a case before Lord Mansfield.[3] Judgments of provisional military courts, and of courts-martial, are also conclusive.[4]

The judgments of the ordinary domestic courts of inferior jurisdiction are conclusive, if it appear that they have acquired jurisdiction.[5] The following classes of judgments have also been held to be unimpeachable, except by appeal, or by some direct proceeding to set them aside: Agreed judgments, awards of arbitrators under a rule of court, and *in pais* when they have been ratified,[6] the decisions of the commissioner of patents,[7] judgments by confession, and judgments by default.[8]

In all cases, however, to preclude the parties or their privies from contesting the matters again, the judgment must have been final, and rendered upon the merits, and judgment must in fact have been entered.[9] It must also have been valid. If void, it cannot work an estoppel; but it is otherwise of voidable judgments.[10] And if the judgment possess all of these elements, it is immaterial whether it was rendered before or after the commencement of the action in which it is interposed as an estoppel.[11]

[1] *Post*, p. 12.
[2] *Post*, p. 13.
[3] *Post*, p. 14.
[4] *Post*, pp. 15, 16.
[5] *Post*, p. 16.
[6] *Post*, pp. 17 – 19, 588.
[7] Rubber Company *v.* Goodyear, 9 Wall. 788, 796; Eureka Co. *v.* Bailey Co., 11 Wall. 488. This point was overlooked in the text. It may be inserted on p. 19.
[8] *Post*, pp. 17 – 19.
[9] *Post*, pp. 19, 629.
[10] *Post*, p. 21.
[11] Ibid.

Judgments, however, possess this conclusiveness only in respect to such matters as were necessary to the decision of the case. As to matters incidentally determined, the judgment is not conclusive, but may be collaterally impeached.[1] With this qualification, matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies, against objection, though the judgment may have been erroneous, and liable to, and certain of, reversal in a higher court.[2]

We proceed now to a more detailed examination of this subject. And first of domestic judgments *in personam*.

We divide this subject into four branches: First, estoppel by former judgment; secondly, estoppel by verdict; thirdly, the extent and operation of judgment and verdict estoppels; and, fourthly, the impeachment of judgments in collateral actions.

The rule in respect to the first division is that the judgment of a court of competent jurisdiction may be relied upon as an estoppel in any subsequent case founded upon the same cause of action.[3] The maxim is, *Nemo bis vexari debet pro una et eadem causa.* The rule in criminal law, that no one shall twice be brought in jeopardy of life or limb, is the counterpart of this doctrine.

In the case of estoppel by verdict,[4] it is immaterial whether the cause of action in which the verdict was given was the same in the subsequent suit or not. The rule in this case is that a point once determined between the parties, or those under whom they claim, may be relied upon as an estoppel in any cause of action that may thereafter be tried. The estoppel arises upon the special findings of the jury. But though it is not necessary that the cause of action should be the same in both cases, it is essential that the point decided should be precisely the same as the one raised in the subsequent suit.

In regard to the effect and operation of judgment and verdict estoppels, in domestic proceedings *in personam*, it is a general rule

[1] *Post*, p. 22.

[2] *Post*, pp. 23, 24.

[3] *Post*, pp. 25 – 32.

[4] The verdict must have been followed by judgment, without which there can never be an estoppel. See *post*, p. 620.

that only parties and privies are bound by, or may take advantage of, the adjudication.[1] The estoppel must be mutual; and it cannot be employed by or against strangers. The term "parties" embraces all persons having a right to control the proceedings, make defence, adduce and cross-examine witnesses, and to appeal from the decision, when an appeal lies.[2] In some cases, however, persons not parties to an action may take advantage of the judgment. In the case of a judgment against one of several co-contractors, if an action be thereafter brought against another of the contractors, he may plead the judgment rendered against his fellow, and this, according to the principles of the common law, will bar the action. This proceeds upon the ground of merger. The plaintiff had but one cause of action, and this was merged by the former proceedings into the higher claim of a judgment.

This result, however, is not effected, according to the American law, by a judgment against one of several tort-feasors; and only the defendant, and those claiming under him, are bound by the judgment. The tort is considered as joint and several.[3] In England, however, the same rule prevails here as in the case of a judgment against one of several joint contractors. It is there held that the tort is joint only, and that it becomes merged in the judgment, whether rendered against a part or all of the wrong-doers.[4]

In other cases where the parties are really the same, though nominally different, the judgment will work an estoppel upon the real parties; as in the case of a judgment obtained by a principal or by a bailor, which estops the agent or bailee to sue upon the same cause of action.[5] But the converse of this rule does not hold, unless the suit be brought at the instance of, or be acquiesced in by, the principal or bailor.[6] Judgment in ejectment, under the old fictitious form of proceeding, is another instance of this kind.[7]

[1] *Post*, p. 46.
[2] *Post*, p. 48.
[3] *Post*, p. 57; Elliott *v.* Hayden, 104 Mass. 180. This case should be cited in note 2, p. 57.
[4] *Post*, p. 49.
[5] *Post*, p. 63.
[6] *Post*, pp. 60, 61, 70.
[7] Ibid.

But a different rule prevails where the parties are nominally the same, but really different; and judgment in such case does not operate as an estoppel upon the real parties.[1]

Persons liable over are bound by judgments against the parties to whom they are so liable, upon notice to appear and defend; but one who was merely a witness upon the former trial will not, it seems, be bound by the judgment; for appearing as a witness does not give a person the rights of a party.[2]

Judgment upon garnishment or trustee process operates as an estoppel in an action by the original creditor of the garnishee or trustee, to the extent of the judgment. But the creditor may prove that the debt is greater than it was admitted to be by the debtor.[3]

The term "privity" denotes mutual or successive relationship to the same rights of property; and persons falling within this definition, whether privies in law, in blood, or in estate, are bound by, and may take advantage of, judgments, equally with parties.[4]

There is no privity in the relations of guarantor and principal, surety and principal, cosureties, and the like, in the sense of making judgments against the one conclusive against the other, without notice to appear and defend.[5] Nor is a judgment against an administrator or executor conclusive against an heir or devisee of the deceased.[6] Judgment against an administrator *de bonis non* is not evidence against his predecessor in the administration;[7] but it is said to be otherwise in the case of an executor of an executor.[8] Judgment, however, against the prior administrator or executor will be conclusive against the successor.[9]

It is an important qualification of the rule that judgments bind the parties, that they bind them only in the character in which they appeared in the proceedings. A judgment against a person in his own proper character is not an estoppel against him as administrator. And the same is true of estoppels generally.[10]

[1] *Post*, p. 65.
[2] *Post*, pp. 67, 68.
[3] *Post*, p. 71.
[4] *Post*, p. 75.
[5] Ibid.
[6] *Post*, p. 78.
[7] *Post*, p. 79.
[8] Ibid.
[9] *Post*, p. 257.
[10] *Post*, pp. 274, 275, 355, note.

There are some cases in which judgments *in personam* operate upon strangers. One of these cases is where a person is affected by a chain of title under a judgment, sale, and execution. When a judgment is introduced as a document connected with the chain of title, the other party will not be permitted to impeach it upon the ground that it is *res inter alios acta*.

We have already remarked that judgments are only conclusive of matters essential to the decision;[1] but it often becomes a question of difficulty to determine the proper application of the rule. It seems, however, in the case of domestic judgments, that the rule is not to be taken strictly, as applicable only to the main question in dispute, but that the judgment is conclusive also of such matters as may have become essential to the decision of the action.[2]

It has been a point of great discussion whether a judgment is conclusive of matters which might have been adjudicated, but which in point of fact were not put in issue; but according to the weight of authority and the better doctrine, the judgment operates to merge only such matters as were necessary parts of the cause of action. There is no estoppel, therefore, except in respect to such matters as the parties to the cause were bound to litigate in it; and the parties are not bound to litigate anything except the single cause of action tried.[3]

But there is a wide difference between the case where a party omits to introduce evidence of one of several demands, or of a counter-demand, and that where he fails to produce sufficient evidence to sustain his position. In the latter case, an estoppel will arise from the judgment.[4]

It is well settled, at the present day, that an action cannot be maintained to recover money paid under a judgment, by reason of evidence, subsequently discovered, showing that the judgment should never have been rendered.[5] But it has been held that

[1] *Ante*, p. xliii.
[2] *Post*, pp. 92–96.
[3] *Post*, pp. 96–112.
[4] *Post*, pp. 112, 113.
[5] *Post*, p. 117.

money obtained by extortion, under the color of legal process, may be recovered.[1]

It is a general principle applicable to the domestic judgments of superior courts, that there can be no impeachment of the jurisdiction of the court in which the judgment in controversy was rendered, unless it appear from the face of the record that the court had not acquired jurisdiction.[2] In the case of superior courts proceeding according to the course of the common law, the jurisdiction will be conclusively presumed in the absence of anything in the record showing that the court had *not* obtained jurisdiction.[3] In cases where these courts proceed otherwise than according to the common law, there is some conflict as to whether the same presumptions will be raised; but a majority of the courts hold that in such cases judgments are reduced to the rank of judgments of the inferior courts, so far as any presumptions respecting jurisdiction are concerned.[4]

Judgments of inferior courts may be impeached for want of jurisdiction in all cases, except where there has been an adjudication of jurisdiction by the inferior court.[5]

According to the better opinion and weight of authority, domestic judgments of the superior courts are not liable to impeachment on the ground that they were obtained by fraud; but the rule does not apply to persons who could not have intervened in the proceedings or appealed from the judgment.[6] Whether judgments of inferior courts may be impeached for fraud does not appear to have been determined; it would seem, however, that if the jurisdiction be established, there could be no further inquiry into the judgment.[7] But in the case of judgments of courts from which there is no appeal, the rule is that they may be impeached at any point, in collateral actions.[8]

Of domestic and foreign judgments *in rem*, the most familiar

[1] *Post*, p. 118.
[2] *Post*, p. 136.
[3] Ibid.
[4] *Post*, pp. 136 *et seq.*
[5] *Post*, pp. 141–145.
[6] *Post*, pp. 148 *et seq.*
[7] *Post*, p. 151.
[8] *Post*, p. 152.

instance is found in the adjudications of the Admiralty in matters of prize. These are conclusive against all the world both of the change of property and of the fact for which the condemnation was pronounced.[1] Adjudications of the Admiralty in matters of collision also belong to this class.[2] So of the condemnation and acquittal of goods in the Exchequer.[3] So of decrees establishing pedigree,[4] decrees in matters of marriage and divorce,[5] decrees of the Court of Probate,[6] orders concerning the settlement and removal of paupers,[7] decrees appointing tutors to minors,[8] and judgments confirming the reports of commissioners of boundary.[9]

Foreign judgments *in rem* have from an early period been regarded with high favor by the courts; and they are held equally conclusive with the judgments of domestic courts in respect to the merits of the matter adjudicated.[10]

In respect to both foreign and domestic judgments *in rem*, the same rules prevail as to the extent and operation of the adjudication as in the case of domestic judgments *in personam*, with the exception that they bind all persons, and not merely the actual parties and their privies.

The rules in regard to impeachment are, however, somewhat different. The jurisdiction of foreign judgments *in rem* may be inquired into, except, perhaps, in the case of an adjudication upon the point;[11] and fraud may be alleged of obtaining the judgment.[12]

Foreign judgments *in personam* occupy a very important position in the law. Until within a comparatively recent period, the conclusiveness of judgments rendered in foreign nations was a matter of much doubt and fluctuation in the courts of England;[13] but it was finally settled that the judgments of foreign and colonial courts, of competent jurisdiction, were conclusive and

[1] *Post*, p. 153.
[2] Ibid.
[3] *Post*, pp. 154 *et seq.*
[4] *Post*, p. 158.
[5] Ibid.
[6] *Post*, p. 159.
[7] *Post*, p. 160.
[8] *Post*, p. 160.
[9] Ibid.
[10] *Post*, p. 164.
[11] *Post*, p. 181.
[12] *Post*, p. 184.
[13] *Post*, p. 185.

unimpeachable upon the merits.[1] The doctrine is not yet altogether settled in America, but the tendency of the courts is in the same direction.[2]

As to the judgments of the sister States of the Union, the matter was made the subject of a constitutional provision, which declares that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. At first, however, this provision was quite generally construed as meaning merely that judgments of the sister States were to be regarded as *prima facie* evidence of their correctness.[3] But this doctrine was soon overruled by the Supreme Court of the United States; and it was there decided that the meaning of the constitutional provision, and of the act of Congress passed to carry the same into effect, was, that the judgments of each State should be received as equally conclusive, in every other State, as in the State in which they were rendered.[4]

Judgments *in personam*, of foreign countries, are liable to impeachment for want of jurisdiction in all cases, except where there has been an adjudication upon the point; for they are not regarded, technically, as records.[5] Different principles, however, prevail in respect to the judgments of the sister States, according to the weight of authority. Such judgments are regarded by most of the courts as records, and entitled to much of the high consideration of records of the domestic judgments. It is generally agreed that parties and privies are not estopped to inquire into the jurisdiction, first, where the record is silent upon the subject; or, secondly, where it recites simply an appearance of the defendant by attorney; or, thirdly, where it is ambiguous or obscure as to the matter. There is much conflict, however, upon the question whether the same rule prevails when the record sets out facts which, if true, are sufficient to give the court jurisdiction. But the better and the more general doctrine is, that in such cases the question of

[1] *Post*, p. 189.
[2] *Post*, pp. 193, 194.
[3] *Post*, p. 196.
[4] *Post*, p. 200.
[5] *Post*, p. 222.

jurisdiction must be taken to be settled by the record itself, and that there can be no denial of its averments.[1]

Jurisdiction cannot be acquired, so as to entitle the judgment to effect beyond the State in which it was rendered, without personal notice to the defendant, within the State, or appearance by him in the suit; and legislative acts declaring that judgments may be rendered in any other way, as in the case of foreign attachments, have no extra-territorial effect. The judgment is a nullity when relied upon as an estoppel in any other State.[2]

It is pretty well settled that judgments of the sister States may not be impeached for fraud;[3] but there is some conflict as to whether proceedings upon such judgments may be restrained in chancery.[4] The question has never received an authoritative answer from the Supreme Court of the United States.

It would seem that fraud is a proper ground for impeaching the judgment of a foreign country.[5]

The doctrine of merger is held inapplicable to judgments rendered in foreign nations; and the plaintiff may, therefore, sue *de novo* in the domestic courts, if he desire.[6]

A different rule obtains in respect of the judgments of the sister American States. Having the same force and effect of domestic judgments, the law of merger prevails, and the plaintiff, if he sue at all in another State, must bring his action upon the judgment.[7]

The relation of privity does not exist between administrators appointed in different States or countries; and therefore a judgment against a foreign administrator cannot be an estoppel against a co-administrator acting in the State of the *forum;* but it is otherwise in the case of an executor in one State and a succeeding administrator *de bonis non* in another.[8]

The cases are in conflict upon the question whether judgments of the sister States of inferior jurisdiction are embraced within the language of the Constitution and act of Congress.[9] The

[1] *Post*, pp. 229 - 237.
[2] *Post*, p. 241.
[3] *Post*, pp. 241, 242, 245.
[4] *Post*, pp. 243 - 245.
[5] *Post*, p. 245.
[6] *Post*, pp. 246, 247.
[7] *Post*, p. 247.
[8] *Post*, p. 257.
[9] *Post*, pp. 258 - 262.

question has never gone to the Supreme Court of the United States. The jurisdiction of such courts, however, is subject to impeachment, except perhaps where they are made courts of record, as in some States, and where there has been adjudication upon the point.[1]

The second principal division of estoppel is denominated estoppel by matter of deed. Lord Mansfield has tersely stated the rule to be, that no man shall be allowed to dispute his own solemn deed.[2] In the form of a definition the estoppel may be said to be, the preclusion of the parties to a deed, and their privies, to deny its force and effect by any instrument of inferior rank.[3]

The same rule prevails here as in the case of estoppels by judgments *in personam*, that the effect of the estoppel is limited to parties, and those claiming under them. The conclusion must be mutual; and strangers are not bound by, and cannot take advantage of, the estoppel.[4] And the rule is also to be qualified by the statement that the parties are only affected in the character in which they executed the instrument.[5]

The parties, however, in order to raise this estoppel, must be *sui juris*; and hence there can be no estoppel by deed against a married woman or an infant.[6]

Of the further limitations of the doctrine, the following should be observed: 1. The deed must be valid; a void deed cannot generate an estoppel, except in certain cases where its invalidity depends upon some external fact, notice of which cannot be imputed to the party alleging the estoppel.[7] 2. The deed does not work an estoppel in matters collateral. 3. If the instrument be a deed-poll, the estoppel applies only against the party executing, except in the case of leases.[8] 4. Estoppel against estoppel sets the matter at large; as where the deed is encountered by a later one inconsistent with the first. 5. And there

[1] *Post*, p. 264.
[2] *Post*, p. 267.
[3] Ibid.
[4] *Post*, p. 269.
[5] *Post*, p. 274.
[6] *Post*, p. 276.
[7] *Post*, p. 283. As to tax deeds, see Blackwell, Tax Titles, 79–82, and cases cited.
[8] *Post*, pp. 289, 290.

is no estoppel as to any particular allegation where the deed contains other statements at variance with it.[1]

Recitals, strictly speaking, are the preliminary statements of such deeds, agreements, or matters of fact as are introduced to explain the reasons for the execution of the deed; but the term is also employed to designate any allegation in the instrument.

Particular and definite recitals alone work an estoppel. There is no conclusion if the allegation is made in a general and indefinite manner.[2]

There are some conclusive presumptions worthy of notice, in the case of estoppels by deed. According to the weight of authority, one who has signed his name to a sealed instrument as a joint obligor will not be permitted to show that he signed as surety.[3] So one who binds himself by deed for the fidelity or good conduct of another, will be estopped to allege that his principal was not duly qualified for the position.[4]

The subject of estates by estoppel, or title by estoppel, is the most important branch of estoppels by deed. Such an estate arises, in general terms, where a grantor, without title, makes a lease or conveyance of land by deed with warranty, and subsequently, by descent or purchase, acquires a title to the premises. In such case the after-acquired title enures, by way of estoppel, to the benefit of the grantee and his privies.[5]

At the early common law, the feoffment, fine, common recovery, and lease possessed the efficacy of actually passing, and transmitting all future estates.[6] But at the present day this result is not so fully accomplished, except in the case of leases.[7]

The rule in the case of leases by deed is that where no interest passes, by reason of the fact that the grantor possesses none, an estoppel arises as to any future estate acquired by him, and the estate enures to the grantee; but if an interest passed by the lease,

[1] *Post*, p. 293.
[2] *Post*, pp. 295 – 318.
[3] *Post*, p. 320.
[4] *Post*, p. 421.
[5] *Post*, p. 322.
[6] *Post*, pp. 322 – 327.
[7] Ibid.

no estoppel will arise as to future estate, because the lease is satisfied with the existing interest.[1]

If a person, having no title, execute a conveyance by deed of bargain and sale, lease and release, or quitclaim, of all his right, title, and interest in land with a simple warranty of title, he will not be barred from claiming any future interest which he may acquire; for such a warranty only embraces existing interests.[2] But if the warranty extend to future interests, they will, when acquired, enure to the grantee; and the existence and extent of the estoppel will depend upon a proper construction of the terms of the warranty.[3]

The estoppel, however, in these cases is a mere rebutter, given to prevent a circuity of action, and arising from the warranty. If it were not raised, and the grantor were allowed to recover the land from the grantee, upon acquiring the future interest, the grantee would in turn be entitled to recover the value of the land from the grantor, by an action upon the warranty.[4]

But in some cases this effect is produced without a clause of warranty, as where the grantor sets forth in the deed that he is seized or possessed of a particular estate. In such case neither he nor his privies will be permitted to deny that he was so seized at the time of executing the conveyance.[5]

The last rule which we notice, under estoppels by deed, is that concerning the release of dower. By this act a married woman is estopped thereafter to set up any claim of dower in the premises granted.[6] But this estoppel does not arise without a proper release, even though the wife unite with her husband in the granting part of the deed.[7] It is immaterial, however, whether the release is made in the same deed with the husband's, or in a separate deed, and at a different time.[8] And it seems that a married woman who releases dower in a deed made without considera-

[1] *Post*, pp. 327, 334.
[2] *Post*, pp. 335, 336.
[3] *Post*, pp. 336 *et seq.*
[4] *Post*, pp. 337, 353 *et seq.*
[5] *Post*, p. 347.
[6] *Post*, p. 364.
[7] Ibid.
[8] Ibid.

tion, and in fraud of her husband's creditors, is not estopped to claim dower against a purchaser, for a valuable consideration, from the grantee.[1]

An estoppel *in pais* is an indisputable admission, arising from the fact that the party alleging it has been induced by the action of the party against whom it is alleged to change his position.[2] The first division of the subject we have denominated Estoppel upon persons holding relations of trust to others; the most important branch of which is the estoppel of a tenant to deny his landlord's title.

The tenant's estoppel of the present day is of modern origin, and rests upon a ground quite different from that of the tenant's estoppel as known in the time of Lord Coke. At that time, the estoppel arose only in the case of a sealed lease, and then only against the party sealing; so that there was no conclusion upon the tenant in the case of a deed-poll or verbal lease.[3] At the present day, however, the estoppel arises by reason of permissive possession, and lasts until a surrender. It is, therefore, immaterial whether the lease be under seal or in parol. The seal is no longer held the foundation of the estoppel.[4]

As the relation of landlord and tenant is one of contract, it follows that the same rules prevail in relation to the competency of parties as in the case of estoppels by deed. Like other contracts, a lease binds only parties *sui juris;* and persons under disability, not being bound by the contract, cannot be estopped to deny its force.[5]

The doctrine of privity prevails here also; and all persons claiming under the tenant are equally estopped to deny the title of the original lessor.[6]

But while a tenant is ordinarily estopped to deny his landlord's title, either by setting up an outstanding title or in any other way, the rule has several qualifications. One of these occurs where a

[1] *Post*, p. 365.
[2] *Post*, p. 369.
[3] *Post*, pp. 370, 372.
[4] *Post*, p. 372.
[5] *Post*, p. 376.
[6] *Post*, p. 377.

person has made an acknowledgment of tenancy through mistake or the fraud of the lessor; in such case the estoppel is removed by proof of the facts.[1] And proof may always be given of the circumstances under which a tenancy or attornment was made.[2]

Another important qualification of the rule is, that the tenant may always show that his landlord's title has expired.[3] This may be done by showing that the tenant has been evicted by title paramount.[4] And according to the more general doctrine in America, it is sufficient to show a constructive eviction.

It has been a matter of conflict among the courts whether the tenant may contest the title of his lessor by showing that he was already in possession of the premises when he took the lease; and although it has been maintained with great force that there is no estoppel in such case, the weight of authority seems to be the other way.[5]

The estoppel may also be removed by disclaimer brought to the notice of the landlord. By such an act, the title of the tenant becomes adverse; and the lessee may eject him at once from the premises. And if he fail to do so before the period of limitation has expired, the tenant may then set up his title, acquired by adverse possession.[6] The same doctrine applies to the case of mortgagors in possession, trustees, and persons in the like situations.[7]

The tenant may also purchase the property of his landlord, and thus extinguish the tenancy.[8] But if he should be bound to pay taxes and neglect to do so, he could not buy in the title at tax sale, and set it up against the lessor.[9]

The rule is subject to the further qualification, that the tenant may show that he was let into possession under a title from which the landlord's title was derived.[10] He may also show that one to

[1] *Post*, pp. 380, 381, 383 – 386.
[2] *Post*, p. 384.
[3] *Post*, pp. 386 *et seq.*
[4] *Post*, p. 387.
[5] *Post*, pp. 388 – 399.
[6] *Post*, pp. 401, 402.
[7] *Post*, pp. 401, 413.
[8] *Post*, p. 403.
[9] Ibid.
[10] Ibid.

whom he has paid rent under an attornment has no derivative title from the lessor.[1]

When, however, none of these exceptions are available to the tenant, the estoppel will ordinarily prevail, even though the tenancy be created by a deed which shows that the landlord possessed no legal estate in the premises.[2] And the estoppel prevails against one in possession of premises under a mere license.[3] It also arises where the tenancy has been created by operation of law.[4]

A relation similar to that of landlord and tenant is held in equity to exist between the vendor of real estate and the vendee, before the payment of the purchase-money; and in such a case the vendee will not be permitted to escape payment by disputing the title of the vendor.[5]

The relation of bailor and bailee gives rise to an estoppel which is somewhat like that in tenancy.[6] The general rule is that one who has received property from another as his bailee, or agent, or servant, must restore the same before he will be permitted to dispute the former's title to it. But the bailee has no better title than his bailor, and, consequently, if a person entitled to the property, as against the bailor, claims it, the bailee will have no defence against him; and in such case, in an action by the bailor, the bailee may set up the *jus tertii*.[7] The estoppel ceases when the bailment upon which it is founded is determined by what is equivalent to an eviction by title paramount.[8] It is not enough that the bailee has become aware of the title of a third person; nor is it enough that an adverse claim is made, so that he may be entitled to relief under an interpleader. The bailee can only set up the title of another against his bailor, when he depends upon the asserted right, title, and authority of that person.[9]

A similar rule applies to the case of assignees and licensees of

[1] *Post*, pp. 404 – 407.
[2] *Post*, pp. 408 – 412. Some exceptions are made to this rule, as will be seen by the reference.
[3] *Post*, p. 412.
[4] *Post*, pp. 399 – 401, 413.
[5] *Post*, pp. 414 – 416.
[6] *Post*, pp. 416 – 421.
[7] *Post*, p. 417.
[8] *Post*, p. 419.
[9] Ibid.

patents. If they have acted under the patent, and received profits from its use, they will not be permitted to deny the validity of the patent in an action by the patentee to obtain an account.[1] But in an action upon notes given to the owner of the patent by the assignee, he may show a want of consideration by proving that the patent was void, and that he derived no advantage from it.[2]

Executors and administrators also are estopped to set up adverse claims to the property of the estate which has come into their possession; but in cases of mistake they may amend their inventories, and leave out property which had been embraced therein and recognized as property of the estate, if no prejudice will result to the parties in interest.[3]

Acceptance of a bill of exchange is a conclusive admission of the genuineness of the drawer's signature, at least in favor of one who has taken the bill after the act of acceptance.[4] And the indorsement of a bill or note precludes the party from denying the genuineness of any of the prior signatures.[5]

Acceptance, however, does not preclude the acceptor, ordinarily, from denying the genuineness of any other signature than that of the drawer, not even that of the payee, though it may have been upon the paper when it was accepted.[6] But if the drawer put the bill into circulation, bearing a forged indorsement of the payee, or bearing the name of a fictitious payee indorsed in the drawer's hand, the acceptor will not be permitted to escape liability by alleging that his warranty extends only to the signature of the drawer.[7]

This warranty of genuineness extends only to the signature itself, and does not embrace the handwriting of the body of the bill; and the party may show that there has been a forgery in this part of the paper.[8] But if the drawer has contributed by his own

[1] *Post*, p. 423.
[2] *Post*, pp. 424, 425.
[3] *Post*, pp. 425, 426.
[4] *Post*, pp. 427, 428, 443.
[5] *Post*, pp. 428, 429.
[6] *Post*, p. 430.
[7] *Post*, pp. 431 - 434.
[8] *Post*, pp. 435, 436.

negligence to a loss, the acceptor, it seems, upon payment, could not recover the money.[1]

An exception has been made to the rule that an acceptor may not dispute the handwriting of his correspondent, the drawer, where the holder has taken the bill before acceptance; in such case, it is said that the acceptor may allege that the drawing is a forgery, if the forgery is discovered within a reasonable time.[2] This doctrine rests the rule strictly upon grounds of estoppel. And the same principle is declared when the duty of inquiry rests upon the holder.[3]

But it is held, that one who receives as genuine, from an innocent party, paper purporting to be his own, but which has in fact been forged, he will not be permitted, upon a late discovery of the forgery, to shift the loss upon the other party.[4]

It has been held that a person selling commercial paper does not warrant its genuineness; but a contrary doctrine has been maintained with convincing force, and the weight of authority is the other way.[5]

The execution of a negotiable promissory note, payable to a party named, imports a warranty of the *present capacity* of the payee to indorse the paper; and the same is true of the acceptance of a bill of that character.[6] But the warranty extends only to the payee's capacity at the time the paper was made or accepted.[7] So, too, by indorsing commercial paper, the party warrants the capacity of all prior parties to the security.

Whether the certification of a bank check as "good" by the teller or cashier of a bank operates to preclude the bank from showing that the drawer had no funds on deposit at the time, has been a matter of conflict. The doctrine held in New York and elsewhere is that the correctness of the certificate is a matter which the certifying bank has the means of knowing, and is bound

[1] *Post*, pp. 436, 437.
[2] *Post*, p. 443.
[3] *Post*, p. 445.
[4] *Post*, pp. 443 – 445.
[5] *Post*, pp. 446, 447.
[6] *Post*, pp. 448 – 450.
[7] *Post*, pp. 450, 451.

to state correctly; and that if the presenting bank relies upon its accuracy, and is caused to forego a remedy, the certifying bank will be held to its statement.[1] And though the authority of the teller or cashier be expressly limited, to the knowledge of the holder of the paper, to certifying in case of funds, the existence of funds is an external fact, which the holder is not bound to ascertain.[2] In Massachusetts, however, it is held that the certification of checks is not within the inherent powers of the teller, so as to bind the bank to pay the amount.[3]

The transfer of a negotiable bill or note by an indorser, after his liability has been fixed, amounts to a representation of his liability, and estops the party from objecting that there were no demand and notice, after the transfer.[4]

The general rule in respect to the estoppel of corporations to set up the defence of *ultra vires* to actions upon their contracts is, that private corporations will not be permitted to raise the defence in respect of matters within the apparent scope of their powers; and that both public and private corporations will be precluded from setting up such defects in their establishment or organization, or in the preliminaries to the execution of their acts, as are peculiarly within their own knowledge and cannot fairly be presumed to be known by the other party.[5]

A partner in a firm will be estopped to deny the truth of a representation concerning the business of the firm, made by his copartner and acted upon.[6] The same principle prevails as to a note or bill fraudulently issued in the firm name, and negotiated to an innocent person. The firm will be liable thereon.[7] So if a party hold himself out as a partner, he will not be permitted to deny the truth of the representation as to such persons as have acted upon it.[8]

It is a general principle, also, that the owner of property who allows another to act or appear as the owner of it, or as having full

[1] *Post*, pp. 451 *et seq.*
[2] *Post*, p. 456.
[3] *Post*, p. 453.
[4] *Post*, pp. 460, 461.
[5] *Post*, p. 466.
[6] *Post*, p. 467.
[7] *Post*, pp. 456, 468.
[8] *Post*, p. 468.

power over it, will be estopped to dispute the authority of such person against persons who have been induced to deal with him upon his apparent authority.[1]

Acknowledgment of receipt in writing is not conclusive evidence of the matter stated, even when in a deed, unless it has been acted upon by the party to whom it is given, so as to change his position.[2]

Where a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things. This is called estoppel by conduct.[3] In order to this estoppel, all of the following elements must be present: 1. There must have been a representation concerning material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that it should be acted upon. 5. It must have been acted upon.[4]

The representation now spoken of is one external to, and not necessarily implied in, the transaction itself; and fraud, or something tantamount thereto, is now the distinctive characteristic of the estoppel.

In all ordinary cases the representation has reference to a present or past state of facts only, and not to future events,[5] or to matters of law.[6]

In the case of estoppel by conduct, only parties and their privies are bound by the representation, and only those to whom the representation is made, and their privies, may take advantage of the representation.[7]

It has been said that the doctrine of estoppel *in pais* has no application to married women or to infants;[8] but the weight of

[1] *Post*, p. 468.
[2] *Post*, pp. 469 - 472.
[3] *Post*, p. 473 *et seq.*
[4] *Post*, p. 480; Martin *v.* Zellerbach, 38 Cal. 300, 315.
[5] *Post*, pp. 481 *et seq.*
[6] *Post*, pp. 496 - 499.
[7] *Post*, pp. 484, 493.
[8] *Post*, p. 485.

authority seems to favor the doctrine that both infants of years of discretion and married women may preclude themselves from denying the truth of their representations in the case of pure torts. Where, however, the conduct or representation is so connected with matter of contract that the action must sound in contract no estoppel arises.[1]

If the representation has been procured by fraud, the party making it may deny its truth; and if the transaction in which the representation has been made is brought about in mutual fraud, there can be no estoppel.[2]

This estoppel may arise from passive conduct or concealment as well as by active conduct.[3] A party who negligently stands by and allows another to contract on the faith and understanding of a fact which he can contradict, may not afterwards dispute the fact in an action between himself and the person whom he has assisted in deceiving.[4] Or, as the principle has been forcibly stated in the Court of Chancery, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to keep silent.[5]

If, however, the party's silence be not the result of fraud or of gross negligence, his conduct will not raise an estoppel;[6] and forgetfulness of one's rights has sometimes been held excusable.[7] But in such case it should not be the result of gross negligence.[8]

Both waiver and acquiescence, also, often operate to produce an estoppel; as where, in cases without a technical consideration, rights have been acquired, or a course of conduct pursued, which it would injuriously affect to allow the passive act to be disclaimed.[9]

Numerous cases of boundary have been decided upon the knowledge or ignorance of the facts represented. The rule in this class of cases seems to be, that an untrue representation

[1] *Post*, pp. 490 – 493.
[2] *Post*, pp. 494, 495.
[3] *Post*, p. 500.
[4] *Post*, pp. 500, 510.
[5] *Post*, p. 501.
[6] *Post*, pp. 524.
[7] Ibid.
[8] Ibid.
[9] *Post*, pp. 524 *et sec*.

concerning the location of a boundary line, in order to estop the party making it, must have been made with knowledge of the location of the real line. When so made to, and acted upon, by a party ignorant of the true line, the former will not be permitted to deny the truth of his statement against the objection of the latter.[1] And a similar rule prevails in other cases.

Ignorance of the truth of the matter by the party making the representation will not, however, remove the estoppel if it be the result of gross negligence.[2] But negligence, to work an estoppel, must be the proximate cause of the loss.[3]

In respect to the intention that the representation should be acted upon, the term "wilful" was at first connected with it, as though it were an essential element of the intention; but this doctrine was soon modified, and the principle settled that, if the representation was *voluntary*, it was sufficient to work an estoppel.[4]

In some cases, as where a contract is implied from the party's conduct, it is held that there need be no actual intention.[5]

The rule that the representation must have been acted upon, in order to the estoppel, is inflexible. The estoppel can never arise in the absence of this element.[6] This proceeds upon the ground that the party would be unjustly put to damage by allowing the truth of the representation to be disproved. But it has been held in several recent cases that proof of express damage is not required, and that it is sufficient if it may be fairly presumed that damage would result.[7]

A party will not be permitted to assume inconsistent positions; and where one has an election between inconsistent courses of action, he will be confined to that course which he first adopts.[8] Accordingly, where a party takes a beneficial interest under a will, he will not be allowed to contest the validity of the testa-

[1] *Post*, p. 531.
[2] *Post*, p. 540.
[3] *Post*, p. 549.
[4] *Post*, pp. 552 *et seq.*
[5] *Post*, pp. 554 - 557.
[6] *Post*, pp. 560 *et seq.*
[7] *Post*, pp. 571 *et seq.*
[8] *Post*, p. 578.

ment.[1] So, if a person assist in procuring the passage of an unconstitutional act by the Legislature, for his own benefit, and proceeds to act upon it, it is held that he will not afterwards be allowed to deny its constitutionality.[2] So, too, if a party bring a suit upon a contract or purchase, or receive money upon the same, he will be held to have conclusively affirmed its validity.[3]

Whether the estoppel of a deed or record should be pleaded or not to be available, has been a matter of doubt at the common law; but the prevailing and better opinion at the present time is that it is conclusive in evidence, though not pleaded; and this is certainly true in case the party claiming the benefit of it has had no opportunity to plead it.[4]

It is well settled at common law that the facts constituting an estoppel *in pais* need not be pleaded; but there have been statutory regulations upon this subject in some of the States.[5]

The proper general issue to an action upon the judgment of a court of record is *nul tiel record*, both in the case of domestic judgments and of the judgments of a sister State of the Union.[6] But *nil debet* may be pleaded to a judgment rendered in a foreign country.[7] The practice in declaring upon a judgment is to allege generally that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned; but in pleading or replying a judgment as an estoppel to an action or allegation, it should be made to appear that the precise point now in question was brought in issue in the preceding action and there determined.[8]

In the case of judgments of foreign countries, or of inferior courts whether domestic or foreign, the jurisdiction of the court must be proved; and in all cases it must appear that the judgment was final, and rendered upon the merits of the question.[9]

The estoppel of a deed, as has been intimated, is, ordinarily,

[1] *Post*, pp. 578, 579.
[2] *Post*, pp. 582 – 584.
[3] *Post*, p. 584.
[4] *Post*, pp. 589, 590.
[5] *Post*, p. 590.
[6] *Post*, p. 592.
[7] Ibid.
[8] Ibid.
[9] *Post*, p. 598.

removed by proof that the instrument is not valid;[1] or when it is introduced in evidence in collateral matters.[2] The same is true when it is encountered by another deed, inconsistent with it;[3] or if other matters appear in the instrument which explain, modify, or overturn the recital relied upon as an estoppel.[4]

The facts to be proved, in order to raise an estoppel *in pais*, have already been referred to.[5] It has been held that this estoppel, when applied to real estate, is available only in equity, and not at law;[6] but the better opinion seems to be that it is available at law also, not on the ground that any interest, legal or equitable, has actually passed, but on the principle of rebutter.[7]

A party is not permitted to take inconsistent positions in pleading, or in the conduct of the trial. And the principle upon which a party is estopped by his course of action in the trial of a cause seems largely to be, that a prejudice would result to the opposite party if a change were to be allowed by the court; so that the case bears a close analogy to that of estoppel by conduct in respect to the matter in litigation.[8]

[1] *Post*, p. 598.
[2] *Post*, p. 599.
[3] Ibid.
[4] Ibid.
[5] *Ante*, p. lx. See also *post*, p. 600.
[6] *Post*, p. 603.
[7] *Post*, p. 606, 607.
[8] *Post*, pp. 609–618.

PART I.

ESTOPPEL BY MATTER OF RECORD.

THE LAW OF ESTOPPEL.

CHAPTER I.

THE RECORD.

Lord Coke thus defines the record: "A record is a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice."[1] And he thus states its effect as an estoppel: "The rolls being the records or memorials of the judges of the courts of record, import in them such incontrollable credit and verity as to admit no averment, plea, or proof to the contrary."[2]

It seems hardly necessary to state that these definitions refer to the memorials of the technical courts of record. The proceedings of courts not technically of record are not at common law invested with this high and unimpeachable character, so far as they are mere entries; though as *res judicata* the proceedings of such courts, of competent jurisdiction, are, as will be fully seen in a subsequent chapter, equally conclusive, at least in America, with the judgments and decrees of courts of record.

The extent and operation of estoppels by record depend, as has been intimated, upon the aspect in which they are considered. In the character merely of a record, i. e. of an entry of the proceedings of a court of justice, they have a conclusive effect upon all persons. No one, whether party, privy, or stranger, will be permitted to dispute the fact that the proceedings recited in the record transpired, or the time at which they purport to have taken place, or that the parties there mentioned as litigants actually or constructively conducted the case, or that judgment was given as therein stated. In the character of an adjudication of a cause of action, or of any material fact in dispute between the parties litigant, the record, generally speaking, has a conclusive operation

[1] Inst. 260 *a*.

[2] Ib. See Glynn *v.* Thorpe, 1 Barn. & Ald. 153, 156; 3 Black. Com. 24.

only upon the parties and those claiming under them; as *res judicata* strangers are not bound by it. Another distinction is, that the doctrine of the conclusiveness of the record, as such, applies to all proceedings; while the doctrine of *res judicata* applies only to collateral proceedings.

We call attention to estoppels by record first, in the character of records or entries of the proceedings of courts of justice; after which we shall consider them in their more important character of *res judicatæ*. The subject can only be clearly illustrated by a presentation of some of the cases in which it is involved.

The early case of Arundell *v.* Arundell[1] was an instance of an attempt to falsify a record. It was alleged for error in fact in that case, that Roger Manwood, one of the justices of the Common Pleas, who had taken the cognizance of a fine, was not a knight according to the authority given him in the *dedimus potestatem*. But it was adjudged that it should not be assigned for error, for it was contrary to the record, which was an estoppel.

And it was held in another early case[2] that a verdict for the plaintiff against an executor, on a plea of *plene administravit*, estopped the sheriff to return *nulla bona;* for such a return would contradict the record.

The subject of the character and conclusiveness of the record was before the Supreme Court of Maine in Willard *v.* Whitney.[3] Mr. Justice Appleton, speaking for the court, said: "The records of the court show the proceedings in relation to a suit from its entry to its final termination. The statements therein contained must be regarded as true. They are not subject to explanation or contradiction *ab extra*. If facts are erroneously inserted in the record, upon sufficient proof the court may order their erasure. If material and existing facts which should appear are omitted in the narration of proceedings, the court may order their insertion. The record is a narration of the proceedings in court; and if, through neglect, mistake, or fraud, errors occur, ... the court may rightfully order that it be so altered as to conform to the facts. When the record is once made up, it is conclusive upon all parties, until altered or set aside by a court of competent jurisdiction.[4]

"The docket entries are minutes made during the progress of a

[1] Yelv. 33.
[2] Noon's Case, 2 Leon. 67.
[3] 49 Maine, 235.
[4] Balch *v.* Shaw, 7 Cush. 282.

cause, from which the record is made up. They are regarded as the record of the court, until the record is extended.[1] But the docket entries are not receivable to disprove or contradict what the record asserts. Neither the former minutes of the clerk, nor the statements of others, as to previously existing but now erased minutes, are to be received in contradiction of the extended record."

In Sturtevant *v.* Randall,[2] Mr. Justice Barrows says: "The rule seems to be well established, that what appears by the record is to be proved by the record only, and nothing contradictory thereto can be admitted; but what need not, and in fact does not, appear by the record, if necessary to establish the identity of the subject-matter, or of the grounds upon which the judgment proceeded, may be supplied by parol proof, to the extent of showing whether matters that might have been admissible under the pleadings were or were not actually presented and considered in the adjudication."[3]

In Campbell *v.* Butts,[4] the defendant pleaded a former recovery to a suit for slander. At the trial he proved that there had been a former suit against him by the plaintiff for slander, and that on the trial of that action the plaintiff gave in evidence the speaking of some of the words charged in his present declaration, but which were not set forth in his former declaration; and that some of the words so given in evidence were spoken before and others after the commencement of that suit. And the defendant objected to evidence of the same words again as a substantial ground of action. The plaintiff had judgment in the first instance; that judgment was reversed in the Supreme Court; and on appeal to the court of last resort the original judgment in favor of the plaintiff was reinstated.

In the Court of Appeals, Mr. Justice Gardiner, delivering the opinion, said that it was a well-established, if not an elementary proposition, that a party who insisted on a former recovery should show that the matters alleged had been determined in the former suit. It followed that when the declaration in the first action stated a special matter as the ground of action, and issue was then taken upon the allegation, parol proof was inadmissible to show that a different subject was litigated; for the evidence would contradict the record.

He then referred to several cases in apparent conflict with the

[1] Read *v.* Sutton, 2 Cush. 115.

[2] 53 Maine, 149.

[3] Chase *v.* Walker, 26 Maine, 555; Dunlap *v.* Glidden, 34 Maine, 517; Parker *v.* Thompson, 3 Pick. 429, 434.

[4] 3 Comst. 173.

above doctrine;[1] but these he distinguished as cases which originated in justices' courts. In these courts the pleadings were generally informal; and with a view to substantial justice, courts of review had attached more consequence to the conduct of the parties and the proofs than to the allegations.

Assuming the admissibility of the evidence, under the pleadings, he said that it appeared upon the trial that some of the words charged were spoken before and some after the commencement of the first suit; but none of them had been set forth in the former declaration. They had, however, been proved before, without objection, for the sole purpose of showing the defendant's malice. None of the words offered in evidence at the present trial were stated in the former declaration; and parol evidence to show a recovery for a different cause of action from the one stated by the pleadings did not tend to explain, but rather contradicted, the record of the former recovery.

In the case of Green *v.* Clark,[2] an attempt was made to prove that a verdict sustaining a plea of not guilty was not rendered on the merits, but was given on some technical objection; and parol evidence was offered to show the real ground of the verdict. But the court held that the evidence was inadmissible.

Beardsley, C. J., said that a general verdict of not guilty, imported that it had been given on the merits; and parol evidence could not be received to explain, qualify, or contradict what was thus shown by the record. That imported absolute verity, and was conclusive that the verdict was rendered on the merits. The parol evidence would destroy the effect of the judgment proved by the record, reducing it to the grade of a judgment of nonsuit.

But in a case in Georgia,[3] where the defendant pleaded a former recovery, and it appeared that no plea had been entered in that action, the plaintiff was allowed to avoid the effect of the plea by showing that the judgment was rendered on the ground that the action was prematurely brought. And similar rulings have been made in other courts.[4]

The foregoing cases are perhaps sufficient to illustrate the character of an estoppel by record, considered as such. The subject must now be presented in the character of *res judicata*.

[1] McLean *v.* Hugarin, 13 Johns. 184; King *v.* Fuller, 3 Caines, 152; Wilder *v.* Case, 16 Wend. 583.

[2] 5 Denio, 497.

[3] Ezzell *v.* Maltbie, 6 Ga. 495.

[4] New England Bank *v.* Lewis, 8 Pick. 113. See Rose *v.* Standen, 2 Mod. 294.

CHAPTER II.

RES JUDICATA.

THE doctrine of *res judicata* — that an issue once determined in a court of competent jurisdiction may be opposed as an effectual bar to any further litigation of the same matter by parties and privies — comes to us from the Roman law. In the time of Gaius, the second century of the Christian era, if a judgment had been pronounced in the *judicium legitimum*, — a tribunal sitting in Rome, or within a milestone of the city, for the trial of causes between Roman citizens,[1] — the novation of the demand extinguished, *ipso jure*, the former right. If the suit were *in judicium imperio continens*, — a special judicium founded on the authority of the prætor, and sitting out of Rome, — this effect of extinguishing the prior demand, *ipso facto*, did not follow; but it empowered the defendant to repel the plaintiff who attempted to bring his action again by the plea (*exceptio*) *rei judicatæ*, or *rei in judicium deductæ*.[2]

In the Institutes of Justinian, published in the sixth century, the rule of law is thus stated: "Item si judicio tecum actum fuerit, sive *in rem*, sive *in personam*, nihilominus obligatio durat, et ideo ipso jure de eadem re postea adversus te agi potest; sed debes per exceptionem *rei judicatæ* adjuvari."[3]

Mr. Sandars, as just cited, after explaining the above distinctions mentioned by Gaius, says: "In the time of Justinian these distinctions had disappeared, and therefore he says generally that the *res judicata* produces an exception. It was to have the same force as it had formerly had in the case of *judicia imperio continentia*, and not that which it had received in *judicia legitima*. Whether the action was real or personal, as the text informs us, the principal obligation still subsisted, and, no novation having taken place, a second action could only be repelled by an exception. But practi-

[1] Sandars, Inst. p. 573.

[2] 3 Gaius, Com. § 181, Tomkins & Lemon's ed. p. 545; 4 Gaius, Com. § 106, Tomkins & Lemon's ed. p. 719.

[3] Inst. Lib. 4, Tit. 13, § 5. The passage is thus translated by Mr. Sandars: "Again, if an action, real or personal, has been brought against you, the obligation still subsists, and in strict law an action might still be brought against you for the same object, but you are protected by the exception *rei judicatæ*."

cally speaking, under the system of *judicia extraordinaria*, as the judge did not receive instructions from a magistrate, and was not bound within the limits of a formula, the distinction between the *res judicata* operating as a bar or as an exception was a very immaterial one."

Immediately afterwards, the same writer thus states the requisites of the plea: "In order that a *res judicata* should be available either as a bar or an exception, it was necessary that there should have been, in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same persons suing in the same character."[1]

The doctrine finds a place also in the Continental countries of modern Europe. It is thus stated in a work by Professors Tomkins and Jencken:[2] "The benefits of a judgment are secured to the victorious party by means of the *actio judicati*, or by the *exceptio rei judicatæ*, which may be pleaded either by the plaintiff or the defendant. The newly created obligation is enforceable by the *actio judicati*. The *exceptio rei judicatæ* bars every claim which may be adverse to the matter of the judgment, *quotiens inter eadem personas eadem questio revocatur*. In respect to the requisites for the identity of a legal contention, two things are needed: 1. The *exceptio* falls to the ground when no identity exists, even though the subsequent action may resemble the former one; 2. The *exceptio* is maintainable when the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar.[3] In personal actions identity of right results from similarity of origin; but in real rights and in real actions, the mode of origin is immaterial."

The term is also found in the Scotch law, and is thus defined:[4] "*Res judicatæ* are those judgments of the supreme courts which have become final, and which are held conclusively to settle the question discussed, so as to prevent the parties or their representatives from afterwards raising an action founded on the same

[1] Dig. 44, 2, 12, Lib. 14.

[2] Mod. Rom. Law, p. 94.

[3] "For example," say the same writers in a note, "a suitor has instituted the *hereditatis petitio*, and has been nonsuited, upon which he proceeds by the *rei vindicatio* for certain definite things. In this case the *exceptio rei judicatæ* comes into operation." This seems to be the same as our estoppel by verdict upon a particular point, which operates, as we shall see, as a bar, without reference to the nature of the subsequent suit.

[4] Bell's Dict. Law of Scotland, *Res Judicatæ*.

medium concludendi, or cause of action. The judgment of an inferior court does not fall under the description of *res judicata;* for in inferior courts, a *copia peritorum* is not presumed, and parties ought not to suffer from employing ignorant procurators when perhaps no better are to be had."[1]

We now proceed to notice the divisions of the subject, as treated in the courts of England and America.

In the English law, the doctrine of *res judicata*, by which we mean, in general terms, as above stated, an estoppel by an adjudication of a matter in a court of competent jurisdiction, depends for its effect, first, upon the nature of the proceeding in which the matter became *res judicata*, — whether it was an action *in rem* or an action *in personam*. This is the great and most important division of the subject, and will presently receive an explanation.

Its effect depends, secondly, upon the forum in which the cause was tried, — whether in the courts of the State in which it is interposed as an estoppel, or in a foreign court. In strict law, the doctrine is only applicable to the judgments of domestic courts; but from motives of policy it has been extended to the judgments of foreign courts of civilized countries,[2] with certain limitations which will appear in the chapter relating to foreign judgments.

Although it is not strictly within the scope of this work to ascertain what constitutes a judgment *in rem*, and what a judgment *in personam*, some explanation of the terms may throw light upon the cases which are to be presented.

The term *in rem*, applied to judicial proceedings, has had a fluctuating signification. In the Roman law it appears to have been received both in a literal sense, to denote a proceeding to obtain possession of a tangible thing, as a piece of land or a horse, and also in a secondary and artificial sense, to indicate a proceeding to obtain or confirm an incorporeal right, as an easement. Thus Gaius says: "In rem actio est, cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi, aquamve ducendi, vel altius tollendi, vel prospiciendi."[3]

[1] This is analogous, as we shall see, to the reason given in our law why the jurisdiction of inferior courts will not be presumed; the actual reason assigned in the English law usually being that a *curia perita* is not presumed. The reason, however, is never extended to the merits of the decision when the jurisdiction is established.

[2] In one case, the doctrine was extended to a decree pronounced in Algiers. The Helena, 4 Ch. Rob. 3. Per Sir William Scott.

[3] Gaius, Com. 4, § 2. The passage is

Ulpian's definition is this: "In rem actio est per quam rem nostram quæ ab alio possidetur petimus; et semper adversus eum est qui rem possidet."[1]

But the *effect* of an adjudication *in rem* is the matter of interest now; and we are told by Professors Tomkins and Lemon that the maxim embodying the vindication, or action *in rem*, was *res judicata inter partes jus facit.* "Not, it is to be observed, *inter omnes*, but *inter partes*."[2] And although Mr. Sandars[3] says that by an action *in rem* we assert a right over a thing against all the world, he states in another place,[4] that this idea was adopted by the writers of the Middle Ages, "on the *analogy* of terms found in the writings of the Roman jurists," but that the doctrine had not been formally adopted either in the system of the Institutes or of the leading jurists. There would seem then to be no difference in this respect between a proceeding *in rem* and one *in personam*; neither binding any but actual parties and privies to the litigation.[5]

But the doctrine of the modern Roman law approaches more nearly our own. In a recent work[6] it is said that "the effect which results from the sentence [judgment] does not reach beyond the parties to the suit and their successors (*inter partes*). It extends, however, to third parties exceptionally, as, for instance, in the case of the invalidity of a testament, in an indictment, in a judgment upon the *status* of a person, in judgments in cases of real servitudes, in joint ownerships, and in other similar instances."

But one step more is required to bring us to the English and American conception of a proceeding *in rem*. With us the term is usually and only properly used in the secondary sense, to denote the incorporeal idea of *status*.[7] It is true that a proceeding in

thus translated in Tomkins and Lemon's edition of Gaius, p. 600: "An action is real when we maintain that a corporal thing is ours, or that some servitude appertains to us; as a mere use, or a usufruct, or right of way for cattle, or of drawing water, or of building higher, or of prospect."

[1] See Tomkins & Lemon, Gaius, p. 601. See also Inst. 4, Tit. 6, § 1. Sandars's ed. p 518.

[2] Tomkins & Lemon, Gaius, p. 275.

[3] Inst. p. 518.

[4] Ib., Introd. § 61.

[5] See also Sandars, Inst. p. 573, citing a passage from the Digest to the effect that the same persons must be suing in the same character, in order to constitute a *res judicata*.

[6] Tomkins & Jencken, Mod. Rom. Law, p. 94.

[7] As stated by an eminent writer (Austin, Jurisprudence, Lect. 40) the term *in rem* denotes the law of *status* or condition; while the term *in personam* designates all else in the law, comprising by far the larger

the admiralty for the condemnation of a vessel as prize of war, or in the exchequer for the condemnation of contraband goods, is said to be, in the one case, a proceeding against the ship, and in the other against the goods; but the paramount object in each case is to determine the *status* of the property, and to pronounce judgment accordingly.

The literal import of the term has, however, crept into our law, and caused considerable confusion. The proceeding by attachment is, for instance, often spoken of as a proceeding *in rem;* but this is quite improper, except as to the method of acquiring jurisdiction of a cause.[1] Attachment is simply resorted to to take the place of notice or appearance, — in other words, merely to give the court jurisdiction; it is a means, and not an end. The object of the litigation is to declare a judgment against the person of the defendant, and not to determine the *status* of the property attached. The attachment would not have been made, had the process of the court reached the defendant. Upon this point Sir John Jervis, in pronouncing judgment in the well-known case of The Bold Buccleugh,[2] said: "The foreign attachment is founded upon a plaint against the principal debtor, and must be returned *nihil* before any step can be taken against the garnishee; the proceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case the proceedings are *in personam;* in the latter, they are *in rem*. The attachment, like a common-law *distringas*, is merely for the purpose of compelling an appearance."

It is perhaps properly said, however, that an order of sale of perishable goods levied on by attachment operates as a proceeding *in rem*, binding, as it does, all persons;[3] for the order is given upon a determination of the perishable nature, the *status*, of the

portion of it. This being the case, it will be seen, that our proceeding *in personam* is also quite different from that of the ancient Roman law; for it embraces much that was in that law included under the term *in rem*, such as the proceeding to obtain possession of a house or a horse. More exactly, then, our proceeding *in personam* is just as much broader than the Roman as that *in rem* is narrower; every proceeding which does not determine a *status* being transferred from the latter to the former.

[1] This is all that is meant by Cooper *v.* Reynolds, 10 Wall. 308. It must be observed that the court in that case is speaking only of the means used to obtain jurisdiction; in which respect the proceeding by attachment is in the nature of the pure proceeding *in rem*. See also Easterly *v.* Goodwin, 35 Conn. 273.

[2] 7 Moore P. C. 267, 282. See, to the same effect, Megee *v.* Beirne, 39 Penn. St. 50.

[3] Megee *v.* Beirne, 39 Penn. St. 50.

property. This fact, taken with the literal import of the term, may have given rise to the erroneous notion that cases of attachment are proceedings *in rem;* or, as was stated in Woodruff *v.* Taylor,[1] proceedings *in rem* of a limited character, — the sale of the property binding only the parties to the cause and their privies. At any rate, the cases agree that such proceedings have no effect as to strangers.[2]

The great point of difference, however, between the idea of a judgment *in rem* in the Roman law and our own conception of it, is in its scope. The more general signification of the term with us is of a proceeding which is conclusive *inter omnes*, against all the world, as contradistinguished from a proceeding *in personam*, which only binds certain determinate persons, the nominal and real litigants in a cause and their privies.

Though, as has just been said, there is still some confusion and uncertainty upon this division of the law, the best authorities give it as above stated;[3] and it is certainly the only reasonable and logical division. We have therefore adopted it; and when we speak of a judgment *in rem*, we refer to one determining the *status* of a person or thing, and binding upon all persons; while we include under judgments *in personam* all other classes, their effect being limited to certain determinate persons or parties and privies.

We shall now proceed to an examination of some of the cases relating to the general doctrine of *res judicata;* after which we shall proceed to the particular divisions of the subject.

[1] 20 Vt. 65.

[2] See cases just cited. In the note of Hare & Wallace to the Duchess of Kingston's Case, 2 Smith, Lead. Cas. p. 890, 5th Am. ed. it is said: "Properly speaking, however, proceedings by attachment are not proceedings *in rem*, but against the interest of the defendant, and those claiming under him, in the thing attached. Thus a judgment rendered on the attachment of a debt or fund, or of specific assets of any other description, will not be a bar to any other demand than that of the person against whom the attachment was issued, and of those claiming under him, even if it consist in an adverse claim to the property attached, or grow out of its negotiation, when it is a negotiable security. Barber *v.* Hartford Bank, 9 Conn. 407; Myers *v.* Beeman, 9 Ired. 116; Ormond *v.* Moye, 11 Ired. 564; Keiffer *v.* Ehler, 18 Penn. St. 388." And these remarks are also applicable to proceedings in replevin. Ib.; Certain Logs of Mahogany, 2 Sum. 589; Dow *v.* Sanborn, 3 Allen, 181.

If the reader, however, possessed of an antiquarian curiosity, desires to examine an early case, in which it is said that this doctrine has been "exploded," let him consult Bank *v.* McRa, 2 Spear, 639.

[3] See Sandars, Introd. Inst. § 61; Austin, Jur. Lect. 40, and following lectures, where this whole subject is considered in the light of a searching, philosophical analysis, and where all the modern authorities are examined.

In order to be conclusive, the judgment relied on as *res judicata* must have been one of a legally constituted court. A case illustrating this principle is Rogers *v.* Wood.[1] That case was a declaration in prohibition; and the question in issue was whether an alleged usurpation of the office of mayor of Chester, by the plaintiff, had been committed within or without the jurisdiction of the Court of Session of the county of Chester. For the defendants a document was produced from the Remembrancer's Office of the Court of Exchequer, purporting to be a decree made (after the hearing of a complaint against the citizens of Chester, and their answer) by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, and the Chief Baron, with the advice and assent of a sergeant of the Queen, and the Queen's Attorney and Solicitor-General, and others of the same court. The document, which recited a decree that the city of Chester was part and parcel of the county of Chester, was produced to show that the usurpation had been committed within the jurisdiction of the court and county above named. The court were of opinion that the document was improperly received.

Lord Tenterden, C. J., said that one could not read the names that appeared in it without seeing that the decree was neither that of the Court of Exchequer, nor of any court of justice known at that time. The judges consisted of some persons who were members of the Court of Exchequer, joined with others who were not. He said it was therefore evident that it was a proceeding before persons not forming any court known to the laws of the land, and having no authority to decide the matter in issue, or to make the decree which they made. And he said that the document was not even evidence of reputation.

In a case in the Supreme Court of Pennsylvania,[2] the defendant, to sustain a plea of former recovery, gave in evidence the record of proceedings before a justice of the peace, by the same plaintiff against the defendant, upon the same cause of action; in which case judgment had been given for the defendant. It appeared from the record that the summons to appear before the justice was returnable December 14. The constable returned that the plaintiff did not want the summons served. Afterwards, and before the return day, the defendant required notice to be given the plaintiff to try the cause; the notice was served, and judgment by default

[1] 2 Barn. & Ad. 245.

[2] Fisher *v.* Longnecker, 8 Penn. St. 410.

given for the defendant. The court held the proceedings no bar.

The ground was that there was a substantial discontinuance of the first suit, and that the subsequent proceedings were therefore *coram non judice*. Without a due return of service upon the defendant, the justice had no hold upon him; and after the discontinuance, neither party could reinvigorate the action without the assent of the other, except by a new writ. The court further said that under the statute the judgment of the justice was only a nonsuit; and this also showed that it was no bar.

In a recent case before the Supreme Court of Massachusetts,[1] the defendant having pleaded in bar a decree rendered in the Supreme Court of the United States, the plaintiff contended that the decree was not a bar to his action by reason of the fact that it was rendered by a divided court.

Chapman, J., speaking for the court, after referring to the fact that it was the early practice of the English courts that no judgment should be given when the court were equally divided,[2] said that it was not so in Massachusetts. And the practice was otherwise also in New York, and in the United States courts.[3] The record had all the elements of a final decree; it purported to order, adjudge, and decree that the decree of the Circuit Court should be affirmed. Its substance would not have been different if the judges had unanimously decided the case. The statement that it was rendered by a divided court did not mean that they were divided as to the question whether it should be rendered, but merely as to the questions of law involved in it.

Though it is commonly said that only the judgments of courts of justice are to be held as conclusive, there are instances in which the proceedings of other bodies have been regarded with the same respect and consideration. A case of the kind[4] occurred before Lord Mansfield, in 1775. The defendant was indicted for an assault upon the prosecutor, in turning him out of the grounds of one of the colleges at Cambridge. The defence was, in substance, that the prosecutor had been expelled, under an order of rustication signed by the master and one fellow, followed by a

[1] Durant *v.* Essex Company, 8 Allen, 103; S. C. 7 Wall. 107.

[2] Proctor's Case, 12 Coke, 118.

[3] Bridge *v.* Johnson, 5 Wend. 342; Morse *v.* Goold, 11 N. Y. 281; Etting *v.* Bank of United States, 11 Wheat. 59.

[4] Rex *v.* Grundon, 1 Cowp. 315.

sentence by the master and two fellows; which sentence had been confirmed by the master and ten fellows. This sentence of expulsion the prosecutor endeavored to attack as illegal. But the court refused to allow this.

Lord Mansfield, after having shown that the prosecutor was only a commoner, and not a member of the college, said that he was then but a mere boarder, and had no right to continue in the college after they had given him notice to quit. "But," said he, "supposing Mr. Crawford [the prosecutor] were subject to the rules and orders of the college; in that case it is insisted that the sentence of expulsion is illegal. And at the trial the statutes of the college were offered in evidence to show that it should have been signed by the master and a *majority* of the fellows, whereas it was signed by the master and *one* fellow only. The answer to it is, that even if the allegation were well founded, the merits, the justice, or the regularity of the expulsion cannot be entered into at the assizes; but the proper mode of impeaching it is by appeal to the visitor. Mr. Justice Willes was of that opinion at the trial, but reserved the question whether the statutes were to be admitted in evidence to impeach the sentence, and enter into the validity of it then. And we are all of opinion with Mr. Justice Willes, that they could not. So that even if Mr. Crawford was a member, and subject to the jurisdiction, rules, and orders of the college, his mode of redress is by appeal to the visitor, and not to this court."

Under this head belong the judgments of military courts. In the recent case of Hefferman *v.* Porter,[1] the defendant pleaded in bar of the plaintiff's action the judgment of a tribunal known as the Civil Commission, created by order of the commander of the Federal forces at Memphis, Tennessee, in April, 1863. The plaintiff demurred to the plea; but the demurrer was overruled.

Mr. Justice Ellett, speaking for the court, said: "The establishment of legal tribunals for the adjudication and protection of civil rights is the most favorable condition for the conquered people. There is always more or less security in a judicial body, organized according to the forms of law for the administration of justice according to the rules that obtain in courts of judicature. There is a dignity and responsibility about such a position that does not fail to command a decent regard to the ordinary rules of justice and of right, or to mitigate the rigor of military rule to

[1] 6 Cold. 391.

some degree of harmony with the humane theories of modern warfare.

"If then the power to create such civil courts exists, by the laws of war, in a place held in firm possession by a belligerent military occupation, and if their judgments and decrees are held to be binding on all parties, during the period of such occupation, as the acts of a *de facto* government, we are not able to see on what grounds we can refuse to them a like effect, when pleaded as *res judicata* before the regular judicial tribunals of the State, since the return of peace."

The same doctrine was applied to criminal cases, of a capital nature, in United States *v.* Reiter.[1] The court, Peabody, J., said that in a country held by military power the authority of the occupying force was paramount, and necessarily operated to the exclusion of all other independent authority in it.[2]

The judgments of the ordinary domestic courts of inferior jurisdiction are equally conclusive with the judgments of the superior courts, provided it appears from the record that the court had acquired jurisdiction of the cause.[3] In the case first cited, the plaintiff, in trespass *quære clausum fregit*, under a lease from the defendants, offered in evidence certain proceedings instituted in a former suit by the present defendants, before justices of the peace, to recover possession of the premises, in which the justices had refused to award restitution. The evidence was held as having conclusively decided that the present defendants were not entitled to have restitution of possession, and that the plaintiff was rightfully in possession.

It seems hardly necessary to state that a judgment of a court of last resort cannot be collaterally attacked in that or in any other court; but the point has been raised and so ruled.[4] Said the court in Sturgis *v.* Rogers, just cited: "A judgment of a court of *nisi prius*, rendered under such circumstances, could never be called in question collaterally before the same or any other court. It must be so also as to the judgments of the court of last resort, when it has jurisdiction, though it mistake the law and err in its judgment. The

[1] 4 Am. Law Reg. N. S. 534.

[2] *A fortiori*, the judgments of courts-martial are conclusive; but it must be made to appear that such courts acted within their jurisdiction. Dynes *v.* Hoover, 20 How. 65; Wooley *v.* United States, 20 Law Rep. 631.

[3] Cumberland Coal & Iron Co. *v.* Jeffries, 27 Md. 526; Burke *v.* Elliott, 4 Ired. 355; Ward *v.* State, 40 Miss. 108; Shaver *v.* Shell, 24 Ark. 122.

[4] Sturgis *v.* Rogers, 26 Ind. 1; Lucas *v.* San Francisco, 28 Cal. 591; Roundtree *v.* Turner, 36 Ala. 555.

rule is as essential in the one case as in the other to the repose of society, and the stability of private rights. To say that a judgment of affirmance here, within the power of the court to render, when the parties are before the court, and the case is brought within its lawful jurisdiction, is not a final end of that litigation, would be a startling doctrine, asserting that a cause can never have a final and binding determination."

Next, as to the conclusiveness of agreed judgments. In a case in Kentucky,[1] the defendants pleaded that the same plaintiffs having formerly sued them upon the same cause of action, that suit was, by the judgment of the court, "dismissed agreed." The defence was held good.

Chief Justice Robertson said that it had frequently been decided in that court that the legal deduction from a judgment dismissing a suit "agreed" was, that the parties had by their agreement adjusted the subject-matter of controversy; and that the legal effect of such a judgment was, that it would operate as a bar to any other suit between the parties, on the same cause of action, thus adjusted and merged in the judgment at their instance.

Upon the same subject the court in Chamberlain *v.* Preble,[2] said that it could make no difference that the facts, or some of them, had been agreed by the parties, instead of being passed upon by the jury. Few trials before a jury were had without the agreement of parties or counsel to many matters thought not to be in controversy. The execution of written instruments, the testimony of absent witnesses, and the date of the happening of particular events, were of this class. A mistake in the admission of any one such fact, if material, would be quite as fatal in its effects upon the conclusiveness of the judgment as an error in an agreed statement of facts. "Indeed," continued the court, "if the effect of the judgment is to be avoided in such cases, it is difficult to say that the existence of material evidence which the defendant failed to produce would not have the same effect. To come to this, it is evident, would be to open to litigation every judgment for eviction upon which the covenantee seeks indemnity from his grantor."[3]

In a Scotch case before the House of Lords[4] it appeared that an

[1] Bank of The Commonwealth *v.* Hopkins, 2 Dana, 395.

[2] 11 Allen, 370.

[3] To the same effect, Dunn *v.* Pipes, 20 La. An. 276. See also, as to agreed judgments, Fletcher *v.* Holmes, 25 Ind. 458.

[4] Jenkins *v.* Robertson, Law R. 1 H. L. Scotch, 117 (1867).

action had been brought to have it declared that there existed a public right of way for foot-passengers along the right bank of the river Lossie. The land-owners appeared and defended, but a verdict went against them. The court having granted a new trial, a compromise was effected; and in pursuance thereof the court pronounced the judgment agreed upon. Subsequently the present action was brought, laying before the court the same matter which had been compromised; and the question arose whether the matter was *res judicata*.

Lord Chancellor Chelmsford said that the judgment in the former action having been the result of a compromise between the parties, it could not be considered as a *judicium*, nor could it be regarded as *res judicata*. Lord Romilly said that *res judicata*, by its very words, meant a matter upon which the court had exercised its judicial mind, having come to the conclusion that one side was right, and having pronounced a decision accordingly. And this was the opinion of the House of Lords.

The distinction between the two classes of cases is this: that in the class represented by Jenkins *v.* Robertson, the judgment itself was agreed upon, and was not passed upon at all by the court; so that in no proper sense could it be regarded as *res judicata;* while in the class represented by Chamberlain *v.* Preble the agreement was merely in relation to the facts, and not at all as to the judgment; that was rendered by the court, upon argument and consideration.

The award of arbitrators, under a rule of court, is also conclusive upon the parties.[1] The case first cited was an action on a note against a prior by a subsequent indorser, who had paid a judgment given by arbitrators, in an action by the holder against all the indorsers; and as no technical issue had been formed, it was contended that the judgment was not an estoppel to the present defendant to deny demand and notice. But the court ruled otherwise.

The opinion of the court was thus stated by Mr. Justice Bell: "The now defendant had then a full opportunity to controvert his liability on the note in question, and to cross-examine the witnesses produced by the bank to prove it, — a privilege which constitutes one of the principal tests of estoppel by judgment. The very point, too, to establish which that judgment is now pleaded, was

[1] Lloyd *v.* Barr, 11 Penn. St. 41; Pease *v.* Whitten, 31 Maine, 117.

then in issue. Notice to the defendants of the dishonor of the note was a material allegation of the *narr.* in that action. And though no technical issue was formed by a formal plea, there was a substantial one under our system of arbitration; requiring proof of everything necessary to show the bank's right to recover.[1] The award of the arbitrators has therefore the same legal effect as the verdict of a jury and judgment thereon, under an issue strictly made up."

Judgment by confession, when final, has been determined to be equally conclusive.[2] In the case first cited there was an attempt, in a collateral action, to impeach such a judgment, on the ground that it had not been confessed in conformity with the provisions of the statute; and in the court below the record had been excluded for the reason mentioned. But upon appeal it was held that the judgment was not absolutely void, and therefore that it could not be collaterally impeached, and should not have been rejected when offered in evidence.

So of a final judgment by default.[3] The first case cited was an action of ejectment; and the question arose upon the validity of such a judgment rendered by a justice of the peace. The court held that the objection raised (which was in relation to the justice's jurisdiction) should have been taken at the former trial, and could not be raised in a collateral action.

A judgment, to constitute an estoppel, must also have been final and upon the merits.[4] Whitaker *v.* Bramson involved the case of a judgment under a rule of court authorizing the plaintiff, in an action on contract, to sign judgment against the defendant upon his omission to file an affidavit of defence, in which case the amount of the judgment was considered indeterminate; and the court held that it therefore was only an interlocutory judgment, and did not work an estoppel. The court said that parties were not concluded by the pendency of an action in any other court, for the

[1] Darlington *v.* Gray, 5 Whart. 487.

[2] Sheldon *v.* Stryker, 34 Barb. 116; Neusbaum *v.* Keim, 24 N. Y. 325; Dean *v.* Thatcher, 3 Vroom, 470. See Snow *v.* Howard, 35 Barb. 55; North *v.* Mudge, 13 Iowa, 496; Twogood *v.* Pence, 22 Iowa, 543 (1867); Sherman *v.* Christy, 17 Iowa, 322; Whitaker *v.* Bramson, 2 Paine, 209; Secrist *v.* Zimmerman, 55 Penn. St. 446 (1867); Kirby *v.* Fitzgerald, 31 N. Y. 417; Weikel *v.* Long, 55 Penn. St. 238. Stay of execution being a judgment by confession, the judgment is equally conclusive, and cannot be collaterally impeached. Anderson *v.* Kimbrough, 5 Cold. 260.

[3] Fagg *v.* Clements, 16 Cal. 389; Mailhouse *v.* Inloes, 18 Md. 328; Green *v.* Hamilton, 16 Md. 317, 329.

[4] Whitaker *v.* Bramson, 2 Paine, 209; Clark *v.* Young, 1 Cranch, 181; *post*, p. 27.

same matter, or by any course of proceeding short of a final judgment. Judgments by default or confession will therefore only conclude the parties and those claiming under them after the damages have been determined, and the amount of the judgment made certain.

The question whether a judgment by default works an estoppel as to a defence by confession and avoidance, which might have been pleaded, arose in Howlett *v.* Tarte.[1] It was decided in the negative. Mr. Justice Williams said: "I think it is quite clear upon the authorities to which our attention has been called, and upon principle, that if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement [sued upon], but shows by matter *ex post facto* that it is not binding upon the defendant." The principle is treated as a general one, applicable as well to judgments upon issue as to those upon default.

In the case of Rock *v.* Leighton,[2] the plaintiff sued the defendant, a sheriff, for a false return. The fact was that the sheriff had returned a *devastavit* to an execution against the plaintiff as an administrator; he having suffered a judgment by default. The plaintiff contended that the sheriff should have returned *nulla bona*, instead of a *devastavit*.

The court, however, ruled that the confession of judgment, or suffering judgment by default, in the case of an executor or administrator, was an admission of assets, and estopped him to deny the fact. Judgment was therefore given for the defendant.

The question has arisen whether a judgment by confession, before an issue was raised, is an estoppel to a subsequent suit.[3] The case cited was a suit to restrain an infringement of a patent, against C., S., & Co. Several years before, the plaintiff having discovered the same firm (composed of the same persons, with two others who subsequently joined it) violating his patent, commenced an action against them for 41 *s.* damages. They submitted, as they alleged, by arrangement, to give judgment for 40 *s.* and costs, before any pleadings had been filed in the case. They immediately took a license from the plaintiff to use his patent for a certain

[1] 10 Com. B. N. S. 813.
[2] 1 Salk. 310.
[3] Goucher *v.* Clayton, 11 Jur. N. S. 107.

time; and now he alleged further infringements. The plaintiff contended that the defendants were now estopped to contest the validity of the patent, by reason of the judgment mentioned.

Wood, V. C., said: "I do not think that even if all the present defendants were parties to the record in the action, a court of common law would have held, in a new action by the plaintiff, that there was an estoppel. There is no evidence of any issue between the parties. The defendants are supposed to say, 'We thought it not worth our while to try the question, and we therefore did not raise the issue.' They submitted, and paid 40 *s.* damages and costs, possibly because they might have been unwilling to give over working, or incur the expense of litigation. At any rate, there appear to have been no pleadings in the action; and the defendants would not be estopped by their submission to the judgment, unless the plaintiff had declared validly, and they had pleaded, denying the infringement."

But, further, he said that he could not prevent the two defendants, who were not parties to the former action, from setting up the defence; and he must therefore hold that there was no estoppel.

But in order that there should be an estoppel, the judgment pleaded must also have been a valid one.[1] If it was void, there is no merger of the cause of action; though it is otherwise, as we shall see, if it was only voidable. In Wixom *v.* Stephens, just cited, the former judgment was ineffectual by reason of a mistake in the name of one of the plaintiffs; and the court were of opinion that they were not precluded from bringing a new suit to recover upon the original demand.

Chief Justice Cooley said that if by any reason the judgment was not valid, and the plaintiffs could not enforce it, then it would seem that it could not constitute a bar to a new suit. The bar in such a case sprang from the party having already obtained a higher security; and where he had obtained no new security, his remedy upon the original demand was not taken away.

It is immaterial that the adjudication relied upon as an estoppel was declared before or after the suit was commenced, in which it is presented as a bar. The date of the adjudication is of no consequence.[2] In the case first cited there had been a verdict for the plaintiff in an action for flooding his land; there was then a mo-

[1] Wixom *v.* Stephens, 17 Mich. 518. Duffy *v.* Lytle, 5 Watts, 120; Child *v.*

[2] Casebeer *v.* Mowry, 55 Penn. 419; Eureka Powder Works, 45 N. H. 547.

tion for a new trial; and, pending the decision, another action was brought for the nuisance. Before this action was tried, the motion for a new trial was refused, and judgment entered. The court below charged that this judgment was no bar to the second suit, because it did not exist when that action was instituted; but on appeal the judgment was reversed for error on this point.

Another general principle of the doctrine of *res judicata*, applying alike to all its divisions, is that it relates only to matters necessarily entering into an adjudication; non-essentials not working an estoppel. This principle, determined in a multitude of cases, and to be fully noticed in the next chapter, was recently reaffirmed in Woodgate *v.* Fleet.[1] As stated in the opinion of Earle, Com., the main object of the suit and judgment there interposed as an estoppel, so far as Woodgate was concerned, was to stay him in the prosecution of an ejectment suit. "And it was sufficient," says the learned judge, "for the complainants to show rights and equities that entitled them to the injunction prayed for. When the court found that the trust deed [under which they claimed] was so far valid as to give them such rights and equities, it was unnecessary to go further. When the complainants established that the deed was properly executed, and was in force, ... they had established all that was necessary to entitle them to a decree against Woodgate. If the court gave a wrong reason for its judgment, or placed it upon unnecessary grounds, the parties would not be estopped as to such reasons and grounds in any other suit.[2] The bill did not pray for a construction of the deed; and that does not seem to have been a matter of controversy and discussion on the trial."

The rule was thus stated: "A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and although a decree, in express terms, purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn upon it, the decree will not conclude the parties in reference thereto."[3]

The question has arisen whether the untraversed allegations of a bill in chancery are *res judicata* and conclusive in a subsequent

[1] 44 N. Y. 1.

[2] Not as to the judgment, but simply as to the unnecessary grounds and reasons; the presumption being that they were not fully investigated.

[3] People *v.* Johnson, 38 N. Y. 63.

suit between the same parties involving the same matter. Boileau *v.* Rutlin [1] was such a case. As stated in the opinion of the court by Parke, B., the action was for the use and occupation of the plaintiff's house for four years and a quarter, ending at Christmas, 1846. The defendant's answer was that he had been let into possession on an agreement to purchase the plaintiff's leasehold interest for a certain sum, and continued in such possession for some time. The defendant paid into court a sum sufficient to cover the compensation for the occupation till Christmas; and the question was whether he was bound to pay the remainder. In order to discharge himself for the rent of this period, it was necessary for him to prove that there was an agreement to purchase, under which he entered. As evidence of the agreement, he put in a bill filed by the plaintiff in chancery, praying for a specific execution of the agreement to purchase, and which stated the terms of the agreement. The question was whether the bill was admissible for that purpose; and though it was not urged that it was conclusive evidence, the opinion of the court virtually reached and decided that question.

After an exhaustive examination of the authorities, the court came to the conclusion that the weight of authority was clearly against the admissibility of the bill, for the only purpose for which it was material in that case; and they ruled accordingly. Said Mr. Baron Parke: "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements in a declaration or plea [which he considered on the same footing as the allegations in a bill of equity], though for the purposes of the cause he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it would seem, to be treated as confessions of the truth of the facts stated." [2]

The question arose in Regina *v.* Hartington [3] as to the effect of a mistake in the entry of a judgment, unappealed from, of a justice of the peace. The facts were briefly these: Two children,

[1] 2 Ex. 665. [2] See also Sweet *v.* Tuttle, 14 N. Y. 465. [3] 4 El. & B. 780.

John and William Gould, had been removed by two justices from the township of L. to that of H. M. In the order they were described as the lawful children of William and Esther Gould. They were at the time unemancipated, and were adjudged to be settled in H. M. in right of their father's settlement therein. The fact was, however, that the father was settled in H. T.; and the officers of H. M., being aware of the fact, made a communication to the respondents, in which they attributed the order to a mistake made by them between the two townships of H. M. and H. T. Subsequently an order was made as to the mother of the children above named, adjudging her settlement also to be in H. M. An appeal was taken and confirmed, subject to the single question whether the township of H. M. was or was not concluded by the order first above mentioned.

The court held the former order conclusive. Coleridge, J., in delivering judgment, said that the order was a judgment *in rem*, conclusive against all the world, as to the settlement of the two children expressly removed by it; and the same rule would hold in respect of the settlement of any one deriving from either of them, so long as one of them retained the adjudged settlement. "If John or William should marry," said he, "and have issue, and die without having acquired a settlement elsewhere, it could not be disputed, immediately after the death, that the settlement of his widow and unemancipated children, after proof of her marriage and their legitimacy, was in the appellant township [H. M.]; for that in which the settlement would, under these circumstances, depend, was the very point decided by the competent tribunal in 1849. Indeed, under these circumstances, the decision on their settlement was legally involved in the judgment of 1849; it is therefore *res judicata*, and reason and policy alike forbid its being again drawn into controversy. The mistake of fact which occasioned a wrong judgment makes no difference. If the matter cannot be brought into controversy, of course the mistake cannot be got at; and though this may seem to produce injustice in the particular instance, as all estoppels are liable to do, yet in the long run the ends of equity and strict justice both are best served by holding strictly to the rule."

The above are some of the more general requisites to a valid plea of *res judicata*. Its qualities will now be more particularly examined as we descend to the divisions of the subject. And first of domestic judgments *in personam*.

CHAPTER III.

DOMESTIC JUDGMENTS IN PERSONAM.

In presenting this subject we have adopted the following order and divisions: —

1. Estoppel by former judgment. 2. Estoppel by verdict in adjudications in different causes of action. 3. The extent and operation of judgment and verdict estoppels. 4. Under what circumstances judgments may be impeached in collateral actions.

1. *Former Judgment.*

First, then, as to the doctrine of former judgment. In order to a correct understanding of it, we must again turn to the decisions of the courts; and we shall first consult those relating to the subject of identity between the former and present causes of action.

The case of Arnold *v.* Arnold[1] is an ably considered American decision upon this subject. It was a writ of right, to which the defendant pleaded an action of trespass *quare clausum fregit*, brought by one under whom he claimed, and judgment against the plaintiff, in respect of the same land. The plea alleged that the only question in issue there was the same as that now in controversy, namely, the right of property. There was also a plea of a former writ of entry *sur disseizin* between the parties to the first action mentioned. Both defences were overruled.

Mr. Justice Putnam, who delivered the opinion of the court, said: "The error lies at the threshold. It is in the assumption that the same cause of action was tried in the action of trespass *quare clausum*, upon an issue of soil and freehold, and the same cause of action was tried in the writ of entry *sur disseizin*, upon the issue of *nul disseizin*, as is to be tried in the writ of right, — an assumption which must strike the mind of every lawyer as extraordinary. Who needs to be told that the plea of soil and freehold would be supported by a defendant who should prove an estate for his life in the *locus in quo*, or that in a writ of right the

[1] 17 Pick. 4.

right of property is in question? Who needs to be told that the actions of trespass *quare clausum fregit*, and the various writs of entry, and the judgments upon them, affect only the right of possession and entry, and do not conclude as to the mere right? It will be answered that nobody doubts these general propositions, but that the pleas in bar aver that the very right of property was tried in the actions of trespass and entry before brought, and that the new demandant had no legal impediment from giving in evidence, in support of the issues joined in those actions, the same matters that he now has to establish his right of property. But how does that appear judicially? The plea avers that the fact submitted to the jury in the action of trespass, and on which the jury found a verdict, was the mere right of property. The issue to be tried was upon the soil and freehold; and the verdict followed the issue. If the verdict had been upon the mere right of property, it could not have warranted a judgment for the prevailing party, on the issue of soil and freehold; for it might be that the plaintiff might have the right of property, and his adversary might have the right of possession. A man entitled to the herbage for the current season might well maintain trespass *quare clausum fregit* against the owner of the fee. The judgment in such action would conclude the parties as to the rights drawn into question by the pleadings, but no further. . . . .

"In every action the verdict is conclusive as to the subject-matter of the suit, and any matter particularly put in issue and found by the jury; and it will not be competent for a party in any other action to deny or plead anything to the contrary of what has been so found and adjudicated. Thus, if the demandant in a writ of entry has a judgment against him by the tenant in a writ of trespass *quare clausum fregit*, upon an issue of soil and freehold, he cannot be permitted to say that, at the time when the action of trespass was commenced, the soil and freehold was not in the tenant. So if the tenant in a writ of right had before prevailed against the demandant in a writ of entry, on a plea of *nul disseizin*, the demandant cannot be permitted to say, contrary to the verdict, that the tenant had disseized him. He must go to trial upon his writ of right with the disadvantages arising from the former verdict against him, and he must establish his right of property in the writ of right (which he was not called upon to establish in the former action), or he cannot prevail."

Referring to the language of Ferrer's Case,[1] he said it was not perfectly exact to say that the same right, or the same matter, was tried in the higher action, in cases of consecutive remedies, which had before been tried in the lower action. The causes of action in trespass *quare clausum fregit*, and in the writs of entry, related to the right of possession and of entry; while in the writ of right the demandant counted upon a fee simple and a deforcement. It was true, indeed, that the question was concerning the same lands; and in this sense only was the same matter tried again, as each presented a different cause of action.

The case of Cleaton *v.* Chambliss,[2] decided in the Virginia Court of Appeals, is also important. The case, stripped of all that is unnecessary to the subject in hand, was this: Wessen, being indebted to Cleaton, paid him by bonds, purporting to have been executed by the defendant Chambliss, who had, before the transfer, promised Wessen, the plaintiff, that he would pay them. Chambliss having failed to pay the bonds at maturity, Wessen sued him upon them; to which action the former pleaded *non est factum*, and obtained judgment on his plea. Wessen then sued him on the special promise to pay the bonds. The defendant demurred to a count setting out the above matters; and he contended, *inter alia*, that the judgment in his favor on the bond was a complete bar to the action. But the demurrer was overruled.

After having considered the questions of pleading and other matters involved, the court, Carr, J., said that the record must also show that issue was taken on the same allegation which was the foundation of the second action. "Here," to quote the language of the court, "the foundation of the action is the promise of Cleaton to Chambliss; there the foundation is the bond of Cleaton to Wessen. The issue there was upon *non est factum;* that was the point decided, the allegation taken and found, — an allegation not put in issue, and which could not possibly be put in issue, in the case before us. If the judgment on the bonds had been pleaded, the plea could not have availed; for, if it had stated the record correctly, a demurrer would have lain; and if incorrectly, the replication of *nul tiel record* would have overthrown it."

In a case in the Supreme Court of the United States,[3] it appeared that the plaintiff had sued the defendant for salt sold and delivered. The defendant pleaded that having given the note of a

[1] 6 Coke, 7. [2] 6 Rand. 86. [3] Clark *v.* Young, 1 Cranch, 181.

third party, indorsed by himself, the plaintiff sued thereon, and judgment was given against him that the action could not be maintained until judgment had been obtained against the maker, and his insolvency made to appear. But the plea was held bad.

Marshall, C. J., said it was clear that the same question was not tried in both cases. In the first case the point decided was, that the suit against the indorser would not lie until a suit had been brought against the maker; in the second suit the point to be decided was, whether the plaintiffs had lost their remedy on the original contract by their conduct respecting the note. These were distinct points; and the merits of the latter case were not involved in the decision of the former.

In the recent case of Goodrich *v.* City,[1] in the Supreme Court of the United States, the appellants filed a bill to recover damages for the sinking of the steamer Huron in the Chicago River. The casualty had been caused by the steamer running against a sunken wreck. The libel alleged that it was the duty of the city to have the wreck removed, and that it was guilty of negligence in not having done so. It further alleged that the city entered upon the work of removal, but abandoned it before the work was accomplished. The defence, among other things, was a former judgment, rendered in the Supreme Court of Illinois, in an action on the case between the same parties, respecting the same injury.[2] The declaration in that case had set forth that it was the duty of the city to remove and prevent obstructions in the river; that the city assumed to discharge the duty, and entered upon the work; that it had negligently suffered the obstruction of the wreck to remain, though knowing its character, and had neglected to place any signal near it to indicate its position; and that, by reason of the premises, the steamer Huron had run upon the sunken wreck. Counsel for the libellants contended that, as there was no specific allegation in the declaration that the city had undertaken to remove the particular wreck, — the main charge in the libel, — the case made in the first action was different from that in the present; and that the State court had merely decided that an action would not lie against the city for a simple *omission* to act, for the mere non-assumption of the power conferred by the charter. The question of liability, in all cases where the city had elected to act and had entered upon and assumed the work, was still an open question.

[1] 5 Wall. 566 (1866). [2] Goodrich *v.* City, 20 Ill. 445.

But the court, by Mr. Justice Swayne, said that, upon a careful examination of the declaration and the libel, they must hold that there was no such difference between the cases as to take the present action out of the operation of the principles of *res judicata*.

An important case, showing the necessity of an identity of the two causes of action to work an estoppel, was determined in 1862, in the Irish Court of Exchequer.[1] It was an action against the defendants for cutting turf upon a bog in the possession of the defendants, the turbary whereof was alleged to have been reserved to the plaintiff's assignor, one Taaffe. The defendants were assignees of James and Harlow Fleming (whose ancestors claimed under the same grantor with Taaffe), made grantees by virtue of a deed made in pursuance of a decretal order, in a chancery suit below mentioned between Taaffe and the ancestors, and revived by the grantees just named. Their defence was, that the effect of the reservation of turbary, claimed by the plaintiff, had been the subject of a bill for an injunction by Taaffe against the ancestors of the Flemings, and of a cross-bill by the latter against Taaffe, in which a decretal order had been pronounced — which, however, had never been made up, but was still in minutes — to this effect, that both bills be retained, with liberty to Taaffe to bring an ejectment or other action against the Flemings for the recovery of such parts of the premises as he claimed. The defence then alleged that an ejectment was brought, in accordance with this order, which was duly tried, and judgment given for the defendants as to the turbary now in question. It further alleged that subsequently Taaffe brought an action on the case against one of the Fleming ancestors to recover damages for having been prevented by him from cutting and carrying away large quantities of turf; that, upon issue and trial, Taaffe was nonsuited; and that, the matter coming up again in the chancery suit first referred to, Taaffe's bill was dismissed, and the Flemings were declared entitled to possession of the bog in question, and to a conveyance thereof; in pursuance of which order the deed above mentioned, to James and H. Fleming, was executed. The defendants contended that the judgments at law and decree in equity, being in full force, were conclusive against the plaintiff's alleged right of turbary. The question arose upon a demurrer to the plea alleging the above matters.

Fitzgerald, B., in pronouncing judgment, said: "We are all of

[1] Beere *v.* Fleming, 13 Ir. C. L. 506.

opinion that the demurrer must be allowed. . . . . The defence cannot be sustained, unless the first decree therein stated constitutes a clear ground in equity for perpetually restraining the plaintiff from asserting that exclusive right to turbary which he claims in this action. Now the deed, so far as it declares any right, declares a right only to the soil of the lands comprised in the deed of 1791,[1] and that right is not questioned in this suit; and so far as the deed of 1820[2] is to be considered as incorporated in the decree, that leaves all other questions in the precise state in which they were left by the deed of 1791.[3] Again, though the plaintiff's assignee [assignor?], Taaffe, sought by his bill a declaration of his exclusive right to turbary, and his bill was dismissed, I can regard that dismissal as deciding nothing but his failure to establish that equitable right; and to a bill seeking a declaration of such right, the decree might be an answer. I apprehend it is not correct to say that a party, seeking equitable relief in respect of an instrument on which he can sue at law, and whose bill is dismissed, though without stating such dismissal to be without prejudice, is necessarily subject to be restrained from proceeding at law on the same instrument. In the case of bills for the specific performance of agreements, though the bill be dismissed without any saving of the plaintiff's right to proceed at law, I believe it to be well settled that the plaintiff may proceed at law; and that if the defendant would restrain him, he must show by bill some substantive equity for the purpose. In this case the court of chancery in truth appears to have passed no judgment of its own, but to have dismissed Taaffe's suit, simply on the ground of his failure to establish his right at law, in an action or actions which could not, without the aid of a court of equity, have conclusively established the right. The decree in the cross-cause contains no declaration of right, except as to the soil, not now in question, and no proviso restraining Taaffe from further proceeding at law. I see nothing therefore to warrant us in holding that a decree would constitute of itself, or with the judgments at law, an equitable bar to this action. No case can better illustrate the effect of a mere dismissal of a bill for equitable relief than Tatham

[1] Under which the Fleming ancestors claimed, who derived title by the same grantor under whom, some years later, Taaffe claimed.

[2] To J. and H. Fleming, by virtue of the decretal order above mentioned.

[3] The terms of the two deeds and of the reservation were almost identical.

v. Wright,[1] possibly one of the most pertinaciously contested cases in the books. Tatham filed a bill in chancery, praying that the will of his ancestor might be declared to have been obtained by fraud and undue influence, and void. An issue *devisavit vel non* was directed. It was tried in 1830, and there was a verdict for the will, and against Tatham. A new trial was moved for, before Sir John Leech, and he refused it; the motion was repeated before the Lord Chancellor Brougham, who called Chief Justice Tindal and Lord Lyndhurst to his assistance, and they, in 1831, refused the new trial, and then the Master of the Rolls dismissed the bill.[2] Thereupon Tatham brought his ejectment, notwithstanding the decree of dismissal, on an issue raising the very same questions as he sought to raise in his ejectment. The ejectment was tried in 1833, and there was a verdict for Tatham; a bill of exceptions was taken by the defendant, and the court awarded a *venire de novo*. The ejectment was again tried in 1834, and there was a verdict for the defendant, against Tatham. The court, on motion, set aside that verdict; and the case was tried again in 1836, and Tatham obtained a verdict and judgment; there was a bill of exceptions, on the argument of which the court was equally divided. The judgment for Tatham was, in consequence, affirmed; and finally there was an appeal to the House of Lords, in which that judgment was upheld; and thus Tatham, whose bill had been dismissed after trial of an issue on the same question, finally recovered the estate." [3]

In another case of trespass for injuring a wall, to a plea that the plaintiff had instituted proceedings in chancery for the very same cause, alleging that the bill had been dismissed, the plaintiff replied that the bill was dismissed with a reservation to the plaintiff of the right of proceeding at law. And the court held that both the plea and the replication were good.[4]

The plaintiff in Norton *v.* Huxley[5] brought an action for a tort, charging the defendant with having fraudulently induced him to take the assignment of an unfinished contract, which proved unfortunate for him. In pursuance of this contract, the plaintiff had furnished labor, materials, and money, for which the assignor

[1] 7 Ad. & E. 313.

[2] These proceedings are reported in 2 Russ. & M. 1.

[3] Wright *v.* Tatham, 5 Clarke & F. 670.

[4] Langmead *v.* Maple, 18 Com. B. N. S. 255 (1855).

[5] 13 Gray, 285.

of the contract had given him an order on the defendant; but this he refused to accept. The defendant offered, in bar of the suit, the record of an action by the plaintiff, against the defendant, to recover for the services, materials, and money just mentioned; in which suit judgment had gone for the defendant. But the record was excluded.

The court said that the former action was one of contract, in which a promise and a breach had been averred. This was an action for a tort, in which the plaintiff alleged that he had sustained damages by the fraudulent representations of the defendant. Proof which would fully support the one case would have no tendency to maintain the other;[1] the questions involved being essentially unlike.

In the case of Harding *v.* Hale,[2] the facts were that the plaintiff had previously brought an action for goods sold, which was defeated by the plea of a special promise by the defendant to pay certain debts of the plaintiff, as a partial payment of the goods. The present action being brought upon this special promise, the defendant pleaded the judgment in the action for the goods sold in bar. But the court held the plea bad.

Mr. Justice Thomas said: "The first suit was not for the same cause of action, nor to be supported by the same evidence, as the second. The judgment in the first did not negative the cause of action relied upon in the second, but affirmed its existence and pointed the way to a better writ."

The result of the cases on this branch of the subject is that a former judgment between the parties can only be pleaded as an estoppel in cases founded upon the same cause of action.[3]

[1] This test of identity is also given in Riker *v.* Hooper, 35 Vt. 457; Marsh *v.* Pier, 4 Rawle, 273; and in many other cases.

[2] 2 Gray, 399.

[3] In the recent case of Packet Co. *v.* Sickles, 5 Wall. 580, the question of the proof of the identity of the contract sued upon with that involved in a former judgment arose; and it was determined that where the declaration in the former action, as set out in the record, alleged a special contract, without stating whether if was a written or parol contract, and where jurors in that action are brought to testify to the identity of that contract with the present, evidence was admissible, on the other side, that the contract was in parol.

Mr. Justice Nelson, speaking for the majority of the court, said: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have

The doctrine in criminal law, that no man shall be brought into jeopardy of his life more than once for the same offence,[1] or, as it is expressed in the Constitution of the United States, that no one shall be subject, for the same offence, to be twice put in jeopardy of life or limb,[2] has a very close relation to this subject of estoppel by former judgment, if it is not in fact but another phase, or perhaps a fragment of the same doctrine.

As the subject is not one that would ordinarily be looked for in a work on estoppel, we shall not examine it with that minuteness which we have brought to the consideration of the preceding matters, but shall be content with a reference to the main features of the doctrine as stated in the text-books.

The doctrine of twice in jeopardy is thus epitomized by the great commentator:[3] "The plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty, upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law. . . . .

been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." Wood *v.* Jackson, 8 Wend. 10; Washington, &c. Packet Co. *v.* Sickles, 24 How. 333; Lawrence *v.* Hunt, 10 Wend. 80.

Packet Co. *v.* Sickles, *supra*, is explained in Aurora City *v.* West, 7 Wall. 82, where the majority of the court adopt the language used in 2 Taylor, Evidence, § 1513, that, except in special cases, the plea of *res judicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time. Mr. Justice Miller dissented, thinking the rule adopted by the majority too broad.

See also, as to proof of identity, Phillips *v.* Berick, 16 Johns. 136; Perkins *v.* Walker, 19 Vt. 144; Gardner *v.* Buckbee, 3 Cowen, 121; Burt *v.* Sternburgh, 4 Cowen, 559.

[1] 4 Black. Com. 335.

[2] Const. Amendt. art. 5.

[3] Black. Com. 335.

"Secondly, the plea of *autrefoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in coloring and in degree. It is to be observed that the pleas of *autrefoits acquit* and *autrefoits convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime."[1]

The rules in relation to the application of the doctrine are somewhat different from those in relation to former judgments in civil causes. The estoppel, if such it may be called, of a former acquittal or a former conviction, arises where the defendant was technically in jeopardy on the former trial; and this begins when the panel of the jury is full.[2] When the jury, being full, is sworn, according to the authority just cited,[3] and added to the other branch of the court, and all the preliminary matters of record are in readiness for the trial, the prisoner, according to the better opinion, has reached the jeopardy which protects him from a second trial. Whatever is done thereafter is immaterial, so far as the question of another trial is concerned; the legal effect of the position of the defendant is to preclude another trial for the same offence. And this, too, though the attorney-general, by consent of the judge, enters a *nol. pros.*, or though he withdraws a juryman, and thus puts an end to the trial.[4] We shall see, in a subsequent part of this chapter, that the rules relating to the binding effect of judgments in civil causes are quite different in this particular.

[1] It is a general principle that a conviction or an acquittal of a higher crime bars an indictment for the same offence as a lower crime. But there are some exceptions to the rule. See Bishop, Crim. Law, § 887.

[2] Bishop, Crim. Law, §§ 856, 857.

[3] Ib. § 858.

[4] Ib. There is some conflict in relation to this position, as the author cited shows; and the reader is referred to that work for a further consideration of the subject. The question hardly comes within the scope of this work, and it will not be further pursued.

But the case is different where the trial is terminated by an adjudication in relation to some defect in the record or proceedings, or in relation to some other preliminary or extraneous matter which prevents a trial upon the merits of the indictment. In such case, upon an adjudication, appearing of record, that such fact exists, the rule of twice in jeopardy has no application; for in truth the defendant has not been placed in jeopardy at all.[1] This doctrine, as we shall see, is in strict analogy to that in relation to civil judgments.

2. *Estoppel by Verdict in an Adjudication in a Different Cause of Action.*

The foregoing cases show that where the cause of action is the same, parties and privies are estopped by the former recovery to relitigate a cause of action once adjudicated. We come now to the second class of cases, which will be seen to be closely related to the preceding, and in which a parallel principle will be found; showing that the two classes of cases are merely detached parts of one and the same general rule.

The class of cases now to be considered is that in which an estoppel occurs when the cause of action in the adjudication interposed as a bar is different from that in the subsequent suit.

This question was involved in Betts *v.* Starr,[2] in the Supreme Court of Connecticut. The plaintiff in that case brought an action of ejectment to recover possession of certain land mortgaged by the defendant to the plaintiff, for the security of a certain promissory note specified in the mortgage deed. The defendant offered to prove that the note mentioned in the mortgage was usurious and void. The plaintiff objected, on the ground that the defendant was estopped by a former judgment between the parties. From the record of the case referred to, it appeared that the present plaintiff had brought suit on the note in question; that the defendant pleaded *non assumpsit;* that the issue of fact was whether the note had been given upon a usurious consideration; and that a verdict was given for the plaintiff. The debt not having been satisfied in that case, the present action was brought. The court held the judgment conclusive of the matter.

Bristol, J., having premised that in the action on the note the jury found that the defendant assumed and promised, and that the

[1] Bishop, Crim. Law, § 873. [2] 5 Conn. 550.

judgment further was a direct adjudication that the plaintiff should recover upon the note; that the making of the promise, and its validity, were not drawn incidentally in question, or to be inferred from the judgment, since this was for the plaintiff to recover the very money secured by the mortgage; he proceeded to refer to the objection that the subject-matter of the two actions was different, the former being brought to recover the debt, and the latter to recover the land mortgaged.

For this objection he said the authority cited was Judge Swift's treatise on Evidence;[1] but the authority did not support the position. When the cause or object of two actions was different, though the matter in dispute was the same in both, a prior judgment was no bar to a subsequent action; but the verdict might be matter of evidence to prove such point in dispute. This was the doctrine laid down by Judge Swift; and this was conceded. And this in no way interfered with the ground of the present decision; for although, when the object and purpose of two actions were different, the judgment in one could not bar the other, it did not follow that in the second action either party could be permitted to contradict what had been expressly adjudicated in the first.

Commenting upon Lee *v.* Hopkins,[2] he said that no one could suppose that, whatever way the judgment or decree on the bill in chancery in the former action there had gone, it could have been pleaded in bar to the last action (covenant) between the parties. The object of the bill in chancery was to get money refunded, alleged by a purchaser of an estate to have been necessarily expended by him to free that estate from incumbrances, which the seller was bound to remove. The object of the suit at law was to recover damages for not conveying the military lands which were to have been taken in part payment. Nothing could have been more distinct than the object of the two suits; and in no event could the decree have been pleaded in bar of the action at law. But the decree in chancery was held conclusive, by way of evidence, that Lee had discharged the incumbrances upon the estate; that being the matter directly adjudicated in the chancery suit. Several English cases were also cited in support of the doctrine.[3]

Upon this branch of the subject, the Duchess of Kingston's

[1] P. 17.

[2] 6 Wheat. 109.

[3] Aslin *v.* Parkin, 2 Burr. 665; Rex *v.* St. Pancras, Peake, 219; Marriott *v.* Hampton, 7 Term, 269; 2 Phillipps, Evidence, 18, 19, 4th Am. ed.

Case [1] is the case most frequently referred to. It was an indictment for bigamy against the Duchess of Kingston, on the ground that at the time of her marriage with the Duke of Kingston she was the lawful wife of one Hervey, then living. She pleaded in defence a judgment obtained by her against Hervey in a suit for jactitation of marriage, whereby she was pronounced a spinster, and free from all matrimonial alliance with Hervey "as far as yet appeared." The case having gone to the House of Lords, the lords spiritual and temporal ordered this question, among others, to be put to the judges, Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage was conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy.

As one of the preliminary steps in the opinion of the judges, De Grey, C. J., said that from the variety of cases relative to judgments being given in evidence in *civil* suits, these two deductions seemed to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another court, for a different purpose.

Having stated that the Spiritual Court had exclusive jurisdiction of questions of marriage, though the temporal courts entertained such questions incidentally, and that the latter courts were bound by the adjudications of the former courts between the same parties, he then said that the case was different when the judgments of the Spiritual Courts were involved in *criminal* cases; for then the parties were in all cases different. The king, he said, in whom the trust of prosecuting public offences is vested, is no party to proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, intervene in any way, or appeal. He then proceeded to say that whatever might be the doctrine as to the conclusiveness of an adjudication as to marriage, when involved in a criminal case, still a cause of jactitation was different. This, he said, "is ranked as a cause of defamation

[1] 20 How. St. Tr. 355; 1 Leach, C. C. 73; 2 Smith's Lead. Cas. 679, 6th Eng. ed.

only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz., that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears; leaving it open to new proofs of the same marriage, in the same cause, or to any proofs of that or any other marriage, in another cause; and if such sentence is no plea to a new suit there, ... it cannot conclude a court which receives the sentence from going into new proofs to make out that or any other marriage.

"So that admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all; and by the rule laid down by Holt, L. C. J., such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true; it may be true that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage."

Outram *v.* Morewood[1] is a leading case of high authority upon this subject. The case was this: An action of trespass was brought for digging and getting out coals from a mine alleged by the plaintiff to be within and under his close, called Cowclose. The defendants pleaded and showed title by a regular chain in right of the wife, from one Zouch; and they averred that the coals in question were under the lands of Zouch, and were derived by bargain and sale to certain immediate bargainees, from them to the defendant, the wife, and were not within a certain exception named. To this plea the plaintiff replied, and relied by way of estoppel upon a former verdict obtained by him in an action of trespass, brought by him against one of the defendants, the wife of the other defendant (she being then sole), in which he declared for the same trespass as now; to which the wife pleaded, and derived title in the same manner as now by her and her hus-

[1] 3 East, 346.

band, and in which she alleged that the coal-mines in question, in the declaration mentioned, were at the time of making the above-mentioned bargain and sale by Zouch part and parcel of the coal-mines by that indenture bargained and sold. And that upon this point, whether the coal-mines claimed by the plaintiff, and mentioned in his declaration, were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed, an issue was taken, and found for the plaintiff, and against the wife. The question was, in the language of Lord Ellenborough, "whether the defendants, the husband and wife, were estopped by this verdict and judgment thereupon from now averring (contrary to the title so then found against the wife) that the coal-mines now in question are parcel of the coal-mines bargained and sold by the indenture above mentioned."

In delivering the judgment of the court, Lord Ellenborough, C. J., said: "The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what has been so found, the husband, in respect of his privity, either in estate or in law, would be equally bound.[1] . . . .

"The question then is, Is the wife herself estopped by this former finding? In Brooke[2] it is said to be 'agreed that all the records in which the freehold comes in debate shall be estopped with the land, and run with the land; so that a man may plead this, as a party, or as heir, as privy, or by *que* estate.' But if it be said that by the freehold coming in debate must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable, as in an assize or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title; and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. In trespass for breaking the plaintiff's close,[3] the defendant pleaded 'that heretofore he himself brought an *ejectione firmæ* against the plaintiff of the same land in which the trespass

[1] Coke, Litt. 352, a.

[2] Tit. Estoppel, pl. 15; Ib. Estate, 158.

[3] Reported in 3 Leon. 194.

is supposed to be done, and had judgment to recover, and demanded judgment if against, etc. It was moved that the bar was not good, because that the defendant had not averred his title; and the recovery in one action of trespass is no bar in another,'[1] etc. *Quod curia concessit.* But as to the matter, the court was clear that the bar was good. And by Periam: 'Whoever pleaded it, it was well pleaded; for as by recovery in assize the freehold is bound, so by recovery in *ejectione firmæ* the possession is bound.' And by Anderson: 'A recovery in one *ejectione firmæ* is a bar in another, especially, as Periam said, if the party relieth upon the estoppel.' And afterwards judgment was given that the plaintiff should be barred. This, it will be recollected, was an action of *ejectione firmæ*, and not an ejectment moulded and regulated by rules of court as it is at present. The court very properly distinguish there between what operates by way of bar to a future recovery for the same thing, and what by way of estoppel. That was the case of a mere recovery in *ejectione firmæ*, without title alleged; and the plaintiff might, in respect of possession, or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is not the recovery, but the *matter alleged* by the party, and *upon which the recovery proceeds*, which creates the estoppel. The recovery of itself, in an action of trespass, is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue ioined, solemnly found against them."[2]

In considering the complaint of Lord Coke[3] as to the multiplicity of suits which "can come to no finite end," the Lord Chief Justice says: "Neither, however, would a verdict and judgment in a real action operate by way of bar to future actions of trespass, or bring the parties 'to the finite end' wished for by Lord Coke; because there may be, notwithstanding the verdict and judgment in the real action, even in that which is most conclusive upon the right (I mean a writ of right itself), a right of possession derived

[1] Staple *v.* Spring, 10 Mass. 72.

[2] In other words, the mere fact of a former recovery is no bar, for the plaintiff now sues for a *subsequent* injury; but the point in issue in the second suit being precisely the same as that in the first, to wit, the possession of the land, the former decision upon this point precludes the parties from further contesting the question.

[3] Preface 8 Rep.

under the owner of the inheritance in fee simple, or those under whom he claims; which may enable a plaintiff in trespass to recover for an injury to his possession, done by the very person in whose favor the absolute right of property shall have been so affirmed in a real action. A judgment therefore, in each species of action, is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided."

After having considered several earlier cases,[1] he closes as follows: "None of the cases therefore, cited on the part of the plaintiff, negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies. The cases adverted to by Lord Holt, and which have been fully explained and enforced by the defendants' counsel, together with the other authorities on the subject of protestation and estoppel,[2] are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal-mines now in question are parcel of the coal-mines bargained and sold by Sir John Zouch; and consequently that the plaintiff ought to recover."

The question arose in Eastmure *v.* Laws[3] whether a judgment, upon a plea of set-off, could be relied upon as an estoppel to a suit upon the claim thus interposed. The action was debt, with the common counts. The plea stated that the defendant in this action had formerly sued the present plaintiff, whereupon he pleaded a set-off against the demand made; that a verdict was given against the party pleading the set-off; and that the present action was brought

[1] Ferrer's Case, 6 Coke, 7; Incledon *v.* Burges, 1 Show. 27; S. C. Comb, 166; Evelyn *v.* Haynes, Surrey, Summer Assizes, 1762; Kinnersley *v.* Orpe, 2 Doug. 517.

[2] Cited from Bro. Abr. Protestation, pl. 9; Fitzherbert, Estoppel, pl. 20.

[3] 5 Bing. N. R. 444.

to recover the identical thing specified in that set-off. The court held the plea a good estoppel. It had been urged, said Tindal, C. J., that there was a hardship in concluding defendants by the result of a plea of set-off, while a plaintiff who failed in his action might elect to be nonsuited, and bring a fresh action when better prepared. But, he replied, it was the defendant's election to put such a plea on the record; and if, before or at the trial, he might wish to withdraw it, he could do so, on proper terms.

A recent case in the English Court of Exchequer [1] shows in a very strong light how rigidly the courts hold to the conclusiveness of judgments when involved in this indirect way. It was an action against the defendant for maliciously signing judgment for £ 28, the amount of the plaintiff's debt originally, after the present plaintiff, then defendant, had paid £ 10 on account of the same; and averring that the present defendant thereupon issued a writ of *ca. sa.* against the plaintiff, indorsed for £ 32, for the debt of £ 28 and costs, under which the plaintiff was arrested, and compelled, in order to procure his discharge, to pay the full sum indorsed, and the sheriff's fees. The declaration then alleged that at the date of the judgment only £ 18 were due, and claimed damages in respect of the £ 10 and extra fees incurred.

The court held that the action could not be maintained while the judgment complained of remained in full force. Said Kelly, C. B.: "Our judgment must be for the defendants. I say so with regret, because no doubt if the act of the defendants was knowingly done, that is, if they knew that the debt was reduced below £ 20 at the time of signing the judgment, their act was highly unjustifiable. But we must here determine the legal question, which is whether the previous judgment . . . . estops the plaintiff from bringing this action, the first step in which is to impeach that record. It is a simple and unanswerable argument against its maintenance, that it is not competent to either party to an action to aver anything either expressing or importing a contradiction to the record; which, while it stands, is as between them an evidence of incontrollable verity. . . . . The then defendant now avers that the judgment was signed and the execution issued wrongfully and maliciously, ... and on this averment founds his action against the judgment creditor. But he cannot make this averment, and therefore cannot maintain this action, whilst

[1] Huffer *v.* Allen, Law R. 2 Ex. 14.

the judgment, against which no averment can be admitted, stands as evidence that, when judgment was signed, the debt which the then defendant owed was £ 28, and not £ 18."

Mr. Baron Bramwell agreed, but did not regret the result of their judgment, for he said the plaintiff himself had caused the difficulty by not pursuing the proper course. He should have had the judgment corrected.

The case of Gardner *v.* Buckbee [1] will illustrate the principle under consideration. That case was an action upon a promissory note. The defence was, that the note was given in part payment of a vessel, and fraud was alleged in the sale; the vessel being at the time rotten and unseaworthy, to the knowledge of the plaintiff. The latter admitted that the note in question was one of two notes, for the same amount, given as the consideration in the sale of the vessel. The defendant offered to prove, in bar of the plaintiff's demand, that the plaintiff had impleaded him in the Marine Court of New York City upon the other promissory note; that upon the trial of that suit, the fraud of the plaintiff in the sale was the only point in question; and that judgment had been given for the defendant, on the ground that the sale was fraudulent. The evidence was objected to, on the ground that the cause of action was different in the former suit from that in the present, being upon another note. The court below ruled that the evidence was not sufficient to bar the plaintiff's demand; but upon appeal it was held that the evidence was conclusive.

Mr. Justice Woodworth, speaking for the court, said it was clear that the question of fraud was tried between the parties in the Marine Court on one of the notes given in payment of the vessel. That court had concurrent jurisdiction; and the law was well settled, he said, that the judgment of a court of concurrent jurisdiction, directly upon the point, was as a plea, a bar, or as evidence it was conclusive between the same parties, upon the same matter directly in question in another court.[2]

Another case which well illustrates this doctrine was tried in the Supreme Court of New York.[3] The action was for medical services, and attendance of the plaintiff's intestate upon the defendant for a broken leg. The defence was a recovery of a judgment

[1] 3 Cow. 120.

[2] Duchess of Kingston's Case, 20 How. St. Tr. 355; 2 Smith's Lead. Cas. 679, 6th Eng. ed.

[3] Edwards *v.* Stewart, 15 Barb. 67.

by the present defendant as plaintiff against the intestate in an action for negligence and unskilfulness in his treatment of the broken leg. The court, reversing the judgment below, held the record conclusive, with proof that the same injury, and the treatment by the intestate, which constituted the present cause of action, were the subject of inquiry in the former suit.

The objects of the two actions, the court said, were different; but the former judgment was conclusive, by way of evidence, upon the fact that the services were unskilfully and negligently performed.[1] The evidence necessary to sustain the present action would have constituted a defence to the action brought by the defendant; and hence the judgment in that action was conclusive in the present.[2]

Another illustration of this branch of the subject is found in Edgell *v.* Sigerson.[3] That was an action upon a promissory note. The plaintiff's petition stated that he had formerly brought suit to recover an instalment of interest on the same note; that the defendant then pleaded that the note had been fraudulently altered in regard to the payment of interest, but that the plaintiff recovered judgment. The defendant now admitted the execution of the note, but defended on the ground of the same alleged fraudulent alteration, insisting that the note had thereby become void. But the Supreme Court overruled the defence.

Richardson, J., said that the integrity of the note was necessarily and directly in issue in the suit brought to recover the annual instalment of interest; and the judgment in that case, having been rendered by a court of competent jurisdiction, determined the question as to the alteration of the note, and was conclusive in the present case.

In a case in Kentucky,[4] it appeared that the defendant, in a former action for work and labor done, had pleaded a special contract with the plaintiff in regard to the services, and had averred a failure by the plaintiff to comply with it; but that, upon issue joined on the point, verdict and judgment were given for the plaintiff. The latter now brought the present action upon the special contract which the defendant had relied upon in the former suit; but the court held that the action could not be maintained.

[1] Hopkins *v.* Lee, 6 Wheat. 109.

[2] Marroitt *v.* Hampton, 7 Term, 265; Le Guen *v.* Gouveneur, 1 Johns. Cas. 436.

[3] 26 Mo. 583.

[4] Hanley *v.* Foley, 18 B. Mon. 519.

Mr. Justice Duvall said that on the former trial the plaintiff had not only repudiated the contract now sued upon, but he had actually denied its existence upon the record, and had only been enabled to obtain a verdict by that denial. And he thus clearly stated the doctrine of the case: "It is a well-established rule of law, sanctioned as well by policy as by precedent, that every material fact involved in an issue must be regarded as determined by the final judgment in the action, and cannot be retried in any subsequent proceeding between the same parties."

In Sturtevant *v.* Randall,[1] it was determined that when in a prior action it had been decided that one whose name appeared on the back of a promissory note was an original promisor, he was estopped to deny that character in any subsequent suit upon the note, brought by any other party to it. In that case the plaintiff's name appeared as a second indorsement on the note; and his suit was against the one whose name preceded his own. The defence was that the plaintiff, in a prior litigation by an indorser, had been decided to be an original promisor, and not a second indorser, whereby his action must fail; and the court unanimously sustained the defence.

The rule in these cases is that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit, in the same or any other court, at law, or in chancery, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it; and this too, whether the subsequent suit is upon the same or a different cause of action. The cases upon this subject are very numerous; we cite a few additional ones in the note.[2]

[1] 53 Maine, 149.

[2] See Aurora City *v.* West, 7 Wall. 82; Beloit *v.* Morgan, 7 Wall. 619; Goodrich *v.* The City, 5 Wall. 566; Doyle *v.* Reilly, 18 Iowa, 108; Allie *v.* Schmitz, 17 Wis. 169; Heath *v.* Frackelton, 20 Wis. 320; Smith *v.* Way, 9 Allen, 472; Jordan *v.* Faircloth, 34 Ga. 47; Demarest *v.* Darg, 32 N. Y. 281; Eimer *v.* Richards, 25 Ill. 289; Babcock *v.* Camp, 12 Ohio St. 11; Sergeant *v.* Ewing, 36 Penn. St. 156; Cabot *v.* Washington, 41 Vt. 168; Lynch *v.* Swanton, 53 Maine, 100; Bunker *v.* Tufts, 57 Maine, 417 (1869); Garwood *v.* Garwood, 29 Cal. 514; French *v.* Howard, 14 Ind. 455; Shuttlesworth *v.* Hughey, 9 Rich. 387; Stewart *v.* Dent, 24 Mo. 111; Walker *v.* Mitchell, 18 B. Mon. 541; Bobe *v.* Stickney, 36 Ala. 482. But see Bernard *v.* Hoboken, 3 Dutch. 412, which, if correctly reported, cannot be law.

We note the following points as results of the general doctrine. A judgment for A, for the use of B, against C, bars an action against C by B. Boynton *v.* Willard, 10 Pick. 166.

The merger of a contract in a judgment is no bar to an action of deceit by which a

We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them; the former operating as a bar to subsequent *actions* founded on the same demand; the latter operating as a bar to the further litigation of the *special findings* of the jury, irrespective of the nature of the cause of action. These distinctions now disappear; and we shall have no further occasion to present the divisions separately, or by special designation.

We shall now examine in detail

3. *The Effect and Operation of Judgment and Verdict Estoppels.*

And first, as to the parties to the former litigation, and those claiming under them. It is a general principle, and one of the elements of the doctrine of *res judicata*, that personal judgments conclude only the parties to them and their privies. We propose now to ascertain the operation and meaning of this rule, and, as heretofore, by a reference to the cases.

We take it for granted that the familiar definition of parties by Professor Greenleaf is present in the mind of the reader in the outset. "Parties," says the learned writer, "in the larger legal sense, are all persons having a right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal

party was induced to enter into it. Wanzer *v.* De Baun, 1 E. D. Smith, 261.

Judgment in a criminal case is inadmissible in evidence in a civil suit, though the same matters may have been in issue in both cases; the parties being different. Betts *v.* New Hartford, 25 Conn. 180; Hutchinson *v.* Bank of Wheeling, 41 Penn. St. 42; Beausoliel *v.* Brown, 15 La. An. 543.

A delivers cigars to B as collateral security for a debt. B subsequently sues A for the amount of the debt; whereupon A alleges, as a defence, that B has sold the greater part of the cigars, and obtains judgment on his plea. This bars an action by A against B, not only for the cigars sold by B, but also for those unsold. The record of the first proceeding is conclusive that he had received the full value of the cigars then sold; and the rule which prevents him splitting up his action takes away his right of action for the residue. Simes *v.* Zane, 24 Penn. St. 242.

Judgment in an action of trover by a a bailor against his bailee is not a bar to an action for the use of the thing bailed. Deens *v.* Dunklin, 33 Ala. 47; Rider *v.* Union Rubber Co., 28 N. Y. 379.

Judgment upon a contract including usury is said to be no bar to a suit to recover the amount of usury. Ross *v.* Ross, 3 Met. (Ky.) 274.

It follows also from the authorities considered, that a valid judgment for the plaintiff sweeps away every defence that should have been raised against the action; and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause. Nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law. Danaher *v.* Prentiss, 22 Wis. 311; Simpson *v.* Hart, 1 Johns. Ch. 91; Le Guen *v.* Gouveneur, 1 Johns. Cas. 436.

from the decision, if an appeal lies."[1] This rule is taken as the foundation of the cases to be presented in this connection.

In Petrie *v.* Nuttall[2] the plaintiff sued in trespass for breaking and entering the plaintiff's land. The defence was that the part referred to was a public highway; and an indictment, verdict, and judgment against the plaintiff were pleaded, by way of estoppel, for obstructing the very same piece of land, as being the Queen's highway. To this defence the plaintiff demurred; and his demurrer was sustained.

Alderson, B., said that it was essential to an estoppel that it should be mutual, so that the same parties or privies might be bound and take advantage of it. The crown and subject were parties to the indictment; and therefore it was not between the two parties to this action. "The distinction," he said, "is shown by the authority cited in Viner's Abr.,[3] where it is said: 'If a man, indicted of extortion or trespass, puts himself into the grace of the king, and makes fine, and after the party sues against him thereof by bill or writ, and he pleads not guilty, he shall have the plea, and the making of fine to the king shall not estop him.' That is precisely this case, and we ought to follow the same rule. No doubt the judgment in the indictment may be given in evidence upon the trial of the issue as to whether the *locus in quo* is a public highway; but it cannot be pleaded as an estoppel."

In a case in Massachusetts,[4] the defendant contracted to sell land to the plaintiff, but, instead of doing this, sold the land to a third person. The action was for the breach; and the defendant produced in bar the record of a suit in chancery by the plaintiff against him and the party to whom he conveyed the land, for a specific performance of the contract and for relief; alleging that the whole subject-matter of the contract and the breach was investigated, and the suit dismissed. But the court said that this was no bar, the suit in equity being between other parties.

There has been some conflict as to whether a judgment against one of several joint contractors is a bar to a suit upon the same contract against all the co-contractors, or against all except the one first sued. The question received the most thorough consideration in the English Court of Exchequer in 1844, in the case of King *v.* Hoare;[5] and though that case is in apparent conflict with

[1] 1 Greenleaf, Ev. § 535.
[2] 11 Ex. 569.
[3] Estoppel (F), 35.
[4] Buttrick *v.* Holden, 8 Cush. 233.
[5] 13 Mees. & W. 494.

one of the decisions of the Supreme Court of the United States,[1] by Chief Justice Marshall, it can scarcely be doubted that on principle the first-named case is correct. The English case referred to was an action of debt against Hoare, who pleaded that the contract alleged in the declaration was made by the plaintiff with the defendant *and one Smith*, jointly, and not with the defendant alone, and that subsequently the plaintiff recovered a judgment against Smith for the same debt.

After disposing of a demurrer to several matters of form, Parke, B., pronouncing the judgment of the court, said that the question was now reduced to one of substance, namely, whether a judgment recovered against one joint contractor was a bar to a suit against another. The importance of the case will justify a quotation at length from the lucid opinion of the learned judge. He said: —

"It is remarkable that this question should never have been actually decided in the courts of this country. There have been, apparently, conflicting *dicta* upon it. Lord Tenterden, in the case of Watters *v.* Smith,[2] is reported to have said that a mere judgment against one would not be a defence for another. My brother Maule stated, in that of Bell *v.* Banks,[3] that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher,[4] Bayley, B. strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors; though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question, we must decide it upon principle, and by analogy to other authorities; and we feel no difficulty in coming to the conclusion that the plea is good.

"If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim *transit in rem judicatam*, the cause of action

[1] Sheehy *v.* Mandeville, 6 Cranch, 253.
[2] 2 Barn. & Ad. 892.
[3] 3 Man. & G. 267.
[4] 1 Cromp. & M. 634.

is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause.[1] And though, in the report in Yelverton, expressions are used which at first sight appear to make a distinction between actions for unliquidated damages and debts, yet upon a comparison of all the reports, it seems clear that the true ground of the decision was not the circumstance of the damages being unliquidated. Chief Justice Popham[2] states the true ground. He says, 'If one hath judgment to recover in trespass against *one*, and damages are certain' (that is, converted into certainty by the judgment), 'although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is because there every of them is chargeable, and liable to the entire debt; and therefore a recovery against one is no bar against the other, until satisfaction.' And it is quite clear that the chief justice was referring to the case of a joint and *several* obligation, both from the argument of the counsel, as reported in Cro. Jac., and the statement of the case in Yelverton.

"We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.

[1] Broome *v.* Wooton, Yelv. 67; S. C. Cro. Jac. 73; Moore, 762. This doctrine has just been reaffirmed in England. Brinsmead *v.* Harrison, Law R. 6 C. P. 584 (1871). But it is otherwise in America. *Post*, p. 57.

[2] Cro. Jac. 74.

"The distinction between a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond; which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by Bayley, B., in the case of Lechmere *v.* Fletcher,[1] and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one of two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he would be deprived of the right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt barred against one is barred altogether; the only exception now being when one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one or two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us quite satisfactorily, to our own minds, to the conclusion that when judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.

"During the argument, a decision of the Chief Justice Marshall, in the Supreme Court of the United States, was cited as being con-

[1] 1 Cromp. & M. 634.

trary to the conclusion this court has come to; the case is that of Sheehy *v.* Mandeville.[1] We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us; and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided that, in an action against two on a joint note, a judgment against one was a bar.[2]

"For these reasons we are of opinion that our judgment must be for the defendant."

In the case referred to,[3] decided by Chief Justice Marshall, the facts and issue were these: The plaintiff having sold goods to R. B. Jamesson, one of the defendants, took his note for the sum due. Afterwards, suspecting that the other defendant, Mandeville, was a partner, he instituted this suit on the note against the two; charging the note to have been made by both, trading under the firm-name of R. B. Jamesson. Mandeville, among other things, pleaded that judgment had been rendered on the note against Jamesson; and the question arose under this plea whether that judgment was a bar to the present suit, as against Mandeville.

Marshall, C. J., speaking for the court, said: "Were it admitted that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could originally be maintained against him, is the note, as to him, also merged in the judgment? Had the action in which judgment was obtained against Jamesson been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a

[1] 6 Cranch, 253.

[2] Ward *v.* Johnson, 13 Mass. 148.

[3] Sheehy *v.* Mandeville, 6 Cranch, 253.

case in which the declaration in the first suit was on a sole contract."

This decision has been criticised by other courts than those above mentioned.[1] But perhaps it may be sustained on the ground that the note contract was regarded as several as well as joint. In a subsequent case in the Supreme Court of the United States,[2] Mr. Justice Grier, who was speaking for the court, said that Sheehy *v.* Mandeville, "though sometimes criticised and doubted in other courts, goes no further than to decide that where one partner is sued severally on a joint or partnership contract, and judgment obtained against him, it is no bar to a suit against the other, because this contract was not merged in the judgment, and because the first judgment was founded on a several, not a joint promise." [3]

It is in accordance with the principle in King *v.* Hoare, that where a vendor brought an action and recovered judgment against one of several partners, the partnership debt was held merged in the judgment, so that there could be no proof upon it against the joint estate in bankruptcy; the partners having failed, and execution upon the judgment having been defeated by an adjudication in bankruptcy.[4]

Mr. Justice Story considers this subject with his usual ability and discrimination in the case of Lawrence *v.* Vernon.[5] That was an action of *assumpsit* by two plaintiffs, to recover money alleged to be due for widening the lower end of a certain street. The defence was that the same plaintiffs with one other had previously brought an action for widening both ends of the street, and recovered judgment; the jury specially finding "that the defendant promised so far as to make himself liable for the damages incurred by widening the *upper* part" of the street. The defendant contended that this judgment concluded the plaintiffs, as the declaration in the former suit embraced the widening of both ends of the street; and the jury by their verdict had negatived the claim as to the widening of the lower end. But the defence was held insufficient.

[1] See Robertson *v.* Smith, 18 Johns. 459; Trafton *v.* United States, 3 Story, 646; Brown *v.* Johnson, 13 Grat. 644.

[2] United States *v.* Price, 9 How. 83.

[3] The English doctrine in King *v.* Hoare may now be considered as well settled. See Gibbs *v.* Bryant, 1 Pick. 118; Robertson *v.* Smith, 18 Johns. 459; Clinton Bank *v.* Hart, 5 Ohio St. 33.

[4] Higgins, *Ex parte*, 3 De G. & J. 33. See Peters *v.* Sanford, 1 Denio, 224.

[5] 3 Sum 20.

The learned judge said that the case was to be distinguished from Hitchin *v.* Campbell,[1] the ruling in which was approved. The parties, he said, were not the same; and the causes of action were not the same. The parties plaintiffs in the former case were Lawrence, Adams, and Lamb; in the present suit, Lawrence and Adams only. In the former suit the promise was alleged to have been made to three persons; and unless a joint promise was proved to all three, that action was not maintainable. Nothing was better settled, said he, than that in *assumpsit* on a joint promise to three, a promise to all jointly must be proved. A promise to two or one of the plaintiffs would not be sufficient; and therefore a promise to Lawrence and Adams alone, in the former suit, would not have entitled the plaintiffs to a verdict. The verdict in that suit might have proceeded upon the very ground which would now entitle the plaintiffs to recover, namely, that the promise as to the lower end of the street was to Lawrence and Adams alone, and not to the three who were then suing. And that finding he considered as altogether consistent with the demand now made by the two plaintiffs.

Judge Story also stated his acquiescence in the test, as generally true, that it would determine whether the causes of action were the same, if the same evidence would support each case.[2] But even tried by this test, the defence must fail. The evidence necessary to sustain the former action was the proof of a joint promise to the three plaintiffs; evidence of a promise to pay two would not suffice; but it would clearly sustain the present case. The infirmity of the defendants' argument was, that it confounded the evidence offered in an action conducing to establish the facts necessary to support it, with the evidence indispensable to support it in point of law. Evidence might be offered in a clause conducing to prove a promise to three, and yet it might only prove a promise to two; and the law in such case holds that the evidence of a promise to two would not support an action by the three.

But it is not always a fatal objection that the parties to a former judgment were more numerous than in the case in which it is relied upon as an estoppel. Thompson *v.* Roberts[3] will show the limitation of the rule. Said Mr. Justice Grier, speaking for the court: "The objection that the parties were not the same in both

[1] 2 W. Black. 779, 827.

[2] Martin *v.* Kennedy, 2 Bos. & P. 71.

[3] 24 How. 233.

suits cannot be sustained. Both parties to this litigation were parties in that suit; the subject-matter was the same; the defence now set up was the same which the pleadings and the evidence show to have been adjudicated in the Court of Chancery. It is true, Smith, who indorsed the notes to the plaintiffs below, and who was interested in the question, was joined as complainant, and the Pickell Mining Company, who had purchased the mortgaged property, were made respondents, according to the practice in the Courts of Chancery, where all parties having an interest in the question to be tried are made parties, that the decree may be final as to all matters in litigation. No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject-matter were admitted by the practice of a Court of Chancery to assist on both sides." [1]

The defendant to a suit[2] upon a joint and several promissory note pleaded that in a former action the plaintiff impleaded the defendant and the other joint and several makers of the note; and that the other defendants pleaded the general issue, and obtained judgment. The plaintiff replied, alleging matter to show that though the other joint and several makers had been discharged, the present defendant was still liable. There was a demurrer to the replication, but it was overruled.

The court said that the questions were not identical; that in the present action the question was whether one was liable, while in the former action the question was whether three were liable. If it had been shown that the note was void for want of consideration, or if any other reason going to show a discharge as to all existed, the defendant would not now be liable; but the replication showed that the former judgment had not determined the question of the liability of the present defendant.

The doctrine of these cases applies also to negotiable instruments. An indorsee of a bill of exchange or of a promissory note may sue all prior parties concurrently or successively; but he is entitled to but one satisfaction.[3] In Porter *v.* Ingraham, just cited, the indorsee had recovered judgment on a promissory note against

[1] See Lawrence *v.* Hunt, 10 Wend. 80.

[2] Stingley *v.* Kirkpatrick, 8 Blackf. 186.

[3] Bishop *v.* Hayward, 4 T. R. 470; Britten *v.* Webb, 2 Barn. & C. 483; Windham *v.* Wither, 1 Strange, 515; Burgess *v.* Merrill, 4 Taunt. 468; Farwell *v.* Hilliard, 3 N. H. 318; Porter *v.* Ingraham, 10 Mass. 88.

the makers, and one of the defendants had been committed to jail on default of payment; and execution was returned unsatisfied otherwise than by the commitment. Subsequently the defendant was released from jail on the undertaking of a third person to pay the amount of the execution; and the jailer afterwards tendered the money to an assignee of the judgment, who declined accepting it. The present action having been brought by the indorsee against an indorser, the latter contended that the matters were a bar to the suit. But the court ruled otherwise. The person of a debtor, it was said, when taken in execution, was a pledge for the debt, but not a satisfaction, at least so far as any other person was concerned besides the debtor imprisoned. As to the negotiations between the jailer and the debtor while he was in prison, they were wholly irrelevant; the jailer acted without authority and beside his duty, and the plaintiff was not concluded thereby.

But the rule in King *v.* Hoare is not applicable in case the judgment has been rendered in favor of a joint obligor defendant, unless it was upon a plea which would operate as a discharge to all.[1] In the case first cited, an attorney sued for counsel fees; whereupon the defendants pleaded that the cause of action arose upon a joint retainer by the defendants and one J. B., and alleged by way of estoppel a suit by the plaintiff against the said J. B. for the same counsel fees now in question, in which judgment was given for J. B. The plaintiff entered a demurrer; and the court sustained it.

Bramwell, B. said: "No doubt if a person jointly liable with others succeeds in an action against him alone, by pleading a release or payment, that would afford a good defence to an action against the other joint debtors; . . . . for a release to one is a release to all, and payment by one is a discharge of all. Therefore, in some cases, a judgment recovered by one of several joint debtors may be pleaded in an action against the others. But this plea does not show that the former action was successfully resisted on some ground common to all the joint debtors; but only that the court gave judgment for the defendant, which may have been on some ground purely personal, as infancy, bankruptcy, or insolvency."

And the rule in this case applies to the parties to negotiable paper; so that, if the indorsee of a bill or note fail in an action

[1] Phillips *v.* Ward, 2 Hurl. & C. 717; Neville *v.* Hancock, 15 Ark. 511.

against the drawer or an indorser, by reason of a defence which belonged entirely to the defendant, as for want of demand and notice, the holder would not be precluded by the judgment from pursuing the other parties to the instrument.[1] And in Neville *v.* Hancock, this doctrine was held good in an action against the maker and indorser of a note jointly. It was held that the maker was not discharged by the failure of the indorsee to make a case against the indorser.

The case of United States *v.* Price,[2] already referred to, is worthy of further notice, upon a kindred point. The main point determined in the case is foreign to the subject of estoppel; but it became necessary to the determination of the case to consider whether a joint judgment was a bar and satisfaction of a joint and several bond. The court said that the law was too well settled to admit of a doubt, or to require a citation of authorities, that if two or more are bound jointly and severally, the obligee might elect to sue them jointly or severally; but having once obtained a joint judgment, the bond was merged in the judgment. It was essential to an election that the party could not have both. One judgment, they continued, against all or each of the obligors, was a satisfaction and extinguishment of the bond. It no longer existed as a security, being superseded, merged, and extinguished in the judgment. The creditor had no longer any remedy, either at law or in equity, on his bond; but his remedy was on the judgment. By this the obligor was now bound, and not by the judgment. The creditor having elected to obtain a joint judgment, could not therefore sue the obligors severally.[3]

But some slight qualifications have been made to this rule. In Olcott *v.* Little,[4] an action was brought against the defendant as surviving promisor of one Slyfield. The defence was a judgment against Slyfield, in a suit commenced against him and the present defendant on the same cause of action. But it appeared that the writ as to the latter was returned *non est inventus;* and that Slyfield having afterwards died, the present action was brought, and service obtained upon the defendant. The court held that the judgment was no defence.

Mr. Justice Upham, admitting the general rule in regard to

[1] Neville *v.* Hancock, 15 Ark. 511.

[2] 9 How. 83.

[3] United States *v.* Cushman, 2 Sum. 426, was directly overruled by this case.

[4] 9 N. H. 259.

judgments upon joint contracts, said that it was subject to exceptions wherever the necessity of the case required a separate suit to be brought. In the present instance a sufficient excuse appeared for the several character of the action heretofore brought against Slyfield, so as not to manifest an election to proceed against him to the discharge of the present defendant; and the excuse arose from the fact that but one of the defendants in the former suit was within the jurisdiction.[1]

A tort committed by more than one person is, in America, contrary to the English rule, regarded as joint and several in nature; giving remedies against each of the tort-feasors separately, or against all jointly.[2] But satisfaction in favor of one is satisfaction in favor of all.[3] It is, however, sometimes a point of difficulty to determine whether the parties are joint trespassers. In the case cited, the plaintiff had been arrested by the same officer, on nine different writs, in favor of different creditors. The writs were all served at the same time; and the plaintiff was finally released from jail by reason of defects in all the writs. The defendant offered evidence of a discharge to others of the creditors, in bar of the action. The evidence was rejected in the court below; but on appeal, it was held admissible.

Mr. Chief Justice Bigelow, speaking for the court, said: "It cannot be denied that the parties who were plaintiffs in the original actions, in suing out their writs against the present plaintiff, and causing him to be arrested and imprisoned, acted separately and independently of each other, and without any apparent concert among themselves. As a matter of first impression, it might seem that the legal inference from this fact is, that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he has been unlawfully arrested and imprisoned.

[1] See also, to the same effect, Tappan *v.* Bruen, 5 Mass. 193; Dennett *v.* Chick, 2 Greenl. 191.

[2] Lovejoy *v.* Murray, 3 Wall, 1; Stone *v.* Dickinson, 5 Allen, 29; Brown *v.* Cambridge, 3 Allen, 474, and cases cited.

[3] Stone *v.* Dickinson, *supra*.

This is the wrong which constitutes the gist of the action, and for which he is entitled to an indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. . . . . The alleged trespasses on the person of the plaintiff were therefore simultaneous and contemporaneous acts, committed on him by the same person acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is then the common case of a wrongful and unlawful act, committed by a common agent acting for several and distinct principals.

"It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law, by which a single act of trespass, committed by an agent, can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable. . . . . He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*. . . . . But no one would contend that he could recover satisfaction from each of the persons liable to an action. When the damages against him had been once paid by any one of those who procured the commission of the trespass, he could not claim to recover them again from each of the others."

Persons who are made parties to proceedings for foreclosure, as subsequent incumbrancers, are bound by the decree, whether their interest be rightly stated or not.[1] In the case cited the parties objecting were made such, as judgment creditors, when they were holders of a chattel mortgage. The court said that it mattered not what their liens were; they had an opportunity to set them up and litigate them in the former action, and must abide the consequence of their failure to do so.

In an early case[2] the plaintiff, in a writ of entry *sur disseizin*, demanded certain lands of the defendant, by virtue of a judgment in a suit for partition. The defendant set up title under one Frye, who had entered upwards of thirty years before, and prior to the suit for partition, and who continued to hold the land until the defendant recovered possession under a mortgage made by Frye; and mortgage had been foreclosed, since which time the defendant had been in possession. It was insisted from this that the petitioner for partition and the other tenants in common had been disseized by Frye; that at the time of partition their right to enter was gone; and that the defendant, not having appeared to defend the partition suit, and not claiming as tenant in common, was not concluded by the judgment, even as to the right of possession. But the defence was overruled.

Parsons, C. J., said that in a writ of partition the plaintiff alleged that all the parties to the writ held together and undivided; and so in the petition, where the co-tenants were not known and not named, as in this case, the petitioner, by declaring that he is seized of an undivided share of land, in effect alleges that all persons holding the land, or any part of it, are seized as co-tenants with him.[3] In this case, therefore, the defendant could not be admitted to question the right of the petitioner, by showing a disseizin of all the tenants in common; and he could not be considered a stranger to the record. He was on the land at the time of the partition, claiming an interest in it; he was notified to appear; and it was owing to his own laches that he did not. To consider him as a stranger to the record under such circumstances would be repugnant to all known rules of law.

[1] Benjamin *v.* Elmira, &c. R. Co., 49 Barb. 441.

[2] Cook *v.* Allen, 2 Mass. 462.

[3] In this case the petition alleged that the petitioner was seized as tenant in common, with divers persons to him unknown. Notice was given, and proclamation made; but no one appeared.

Other cases not of privity have also arisen in which a former judgment has been held a bar, though the parties were not precisely the same in that cause as in the one to which it is invoked as a bar. Ehle *v.* Bingham[1] was such a case. The action was brought to recover damages for the breach of warranty in the sale of sheep. The plaintiff had given his note for them, in which another had joined with him as surety; and the sheep having proved to be diseased, he sued on the warranty of soundness. The defendant gave in evidence the record of an action by himself, in which he obtained judgment upon the note against the plaintiff *and his surety;* the latter not being a party to the present action. It appeared from the record that the plaintiff had then set up in defence the subject-matter of the present suit. The plaintiff objected to this judgment as *res inter alios acta;* but the objection was overruled.

Upon this point Mr. Justice Edwards said: "It will be remembered that the former suit was upon a promissory note which grew out of a transaction to which the plaintiff and defendant in this suit alone were parties, and that the plaintiff in this suit put in a separate plea, and notice of a matter personal to himself; and the mere fact that another person was sued with him ought not to deprive the defendant in this suit of the benefit of the former judgment."

In an action of assumpsit[2] for rent against the assignees in bankruptcy of one Evans, it appeared that in a former action of replevin by the assignees against the present plaintiff's bailiff for cattle distrained for rent of the same premises, the question arose whether there was a tenancy between the assignees and the plaintiff. The issue was found against the assignees; and the plaintiff now relied upon the judgment in that case to prove the tenancy; the former judgment having determined that they were tenants at a time subsequent to that now alleged. The defendants contended that the record was not evidence against them, as the parties in the replevin suit were different from those in the present; the defendant in that action being the bailiff. But Lord Ellenborough held the judgment conclusive.[3]

The case of Tate *v.* Hunter[4] involved a similar question. The

[1] 7 Barb. 494.

[2] Hancock *v.* Welch, 1 Stark. 347.

[3] This must have been on the ground that the parties were substantially the same. Starkie, Ev. 329; 2 Taylor, Ev. § 1500; Simpson *v.* Pickering, 1 Cromp. M. & R. 527; Kinnersley *v.* Orpe, 2 Doug. 517; Cave *v.* Reeve, 14 Johns. 79.

[4] 3 Strob. Eq. 136.

facts in brief were these: The complainant's testator had brought an action of assumpsit against a sheriff for a sum of money collected by him under process of a court of law, and retained to be applied to an execution which had been assigned to the defendant. After a revivor by the complainants, as executors, and a closely contested litigation, judgment had gone for the defendant. The complainants then filed the present bill, praying that the execution and judgment in question (the one assigned to the defendant) might be postponed to the subsequent judgment in favor of their testator against the party whose funds the sheriff had collected and retained. But the bill was dismissed.

Dargan, Ch., said that the only question to be considered was whether the present suit was between the same parties as were before the court in the prior suit against the sheriff; and he was of opinion that they were the same. The sheriff in the former action was only a nominal party; the defendant in the present case being the real party in interest. The sheriff was simply a stakeholder, without a particle of interest; it mattered not to him which of the claimants recovered the money in his hands. The battle was fought over his shoulders by the real parties. The defendant was not only the real party, adverse in interest to the complainants, but he had notice of the suit, and defended it by counsel.

In another case where an action was brought against a servant for a trespass, a defence was held good, that the plaintiff had brought an action against the principal, for the same trespass, alleging that he (the plaintiff) had claimed for a trespass committed by the servant, defendant in the present suit, and that judgment had gone against the plaintiff.[1] The ground was that the principal and servant were substantially one in interest. "To permit a person," said Shepley, C. J., "to commence an action against the principal, and to prove the acts, alleged to be trespasses, to have been committed by his servant, acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record, or their privies, expands so as to admit it when the same question has been decided and judgment

[1] Emery v. Fowler, 39 Maine, 326.

rendered between parties responsible for the acts of others. A familiar example is presented in suits against a sheriff, or his deputy, which being determined upon the merits, against or in favor of one, will be conclusive upon the other."

The point last stated by the court, by way of illustration, that a judgment for or against a sheriff or his deputy bars an action against the one not sued, is not altogether settled. The point arose in Massachusetts in the case of Campbell *v.* Phelps.[1] The action was trespass *de bonis asportatis* against the sheriff of Hampden. The defence was that the taking complained of was done by the deputy-sheriff; and that the plaintiff had sued him for it, obtained judgment, and that execution had been sued out. The plaintiff replied that the deputy was taken in custody by reason of want of goods, whence he was afterwards discharged by law; and that the judgment had not been satisfied. There was a demurrer to the replication; and a majority of the Supreme Court sustained it, and adjudged the replication bad. The majority were agreed that the sheriff and his deputy were not to be considered as joint trespassers in any tort done by the latter alone, so as to subject them either to a joint action, or to give the party injured a right to bring his action against one, after having recovered judgment and sued out execution against the other.[2] The same doctrine seems to prevail in New Hampshire.[3]

The Supreme Court of Connecticut have, however, held the contrary in a case similar in its state of facts with Campbell *v.* Phelps, *supra*. Without a real satisfaction, they said there was no estoppel.[4]

As a question of principle, there seems to be much difficulty in holding that a judgment against the deputy, in a suit without notice to the sheriff, should conclude the principal. Judgments are conclusive only upon parties and those claiming under them. The sheriff is neither the same party as his deputy, nor is he in privity with him. The relation between them seems analogous to that between joint and several promisors and joint trespassers;[5] in which case the judgment against one does not extinguish the right of action against the rest.

The doctrine upon which the opposite view rests, in part, that the judgment in such cases as Campbell *v.* Phelps operates to

[1] 1 Pick. 62.
[2] See Clapp *v.* Thomas, 5 Allen, 158.
[3] King *v.* Chase, 15 N. H. 9, 19.
[4] Morgan *v.* Chester, 4 Conn. 387; Sheldon *v.* Kibbe, 3 Conn. 214.
[5] Morgan *v.* Chester, 4 Conn. 387.

vest the property in the defendant, is perhaps a more formidable barrier; but the defence then rests upon payment and satisfaction, and not upon the doctrine of estoppel. And it may be worthy of note that this idea has lately been overturned in England, and has been generally repudiated in America.[1]

In cases of principal and agent, or of bailment, if the principal or bailor bring an action and proceed to judgment on the merits, the agent cannot sue for the same demand, even though he could have done so originally in his own name.[2]

In the case first cited, it appeared that the owners of a cargo of salt had brought suit against certain carriers (who had agreed to forward it) for negligence in failing to deliver it at the place agreed, with a count in trover for a conversion of the salt. Judgment had gone for the defendant. Subsequently, in the present case, the bailee of the owners brought an action based on the same grounds; but the court held the former judgment a bar.

Said Gardner, C. J.: "It is a general rule that a bailee, having a special property, and the general owner, may either of them sustain an action for the conversion of, or an injury to, property in which they are interested. The right to sue is indispensable to enable each to protect his particular interest; but as the law will not suffer a defendant to be twice harassed for the same cause, only one suit can be brought, and it will be a bar to every other." It seems to us, however, that the proper ground upon which the cases of this class rest is, that the parties are substantially the same. The subsequent suit of the agent must be in right of the principal, and this right has passed *in rem judicatam*. The so-called "special property" of the agent gives him no rights distinct from those of the principal, as to third persons. His rights as to all persons except the principal are the rights of the principal.

The question as to the conclusiveness of a former judgment in ejectment came before the Supreme Court of the United States, in the recent case of Miles *v.* Caldwell.[3] The complainant sought to evade the force of the defence, on the ground that the verdict and judgment in ejectment had not that conclusive effect which they had in other proceedings.

[1] See Brinsmead *v.* Harrison, Law R. 6 C. P. 584 (1871); Lovejoy *v.* Murray, 3 Wall. 1 (1865). See also the note of Messrs. Bennett and Smith to Buckland *v.* Johnson, 26 Eng. Law & E. 328, 334.

[2] Green *v.* Clarke, 12 N. Y. 343; Kent *v.* Hudson River Railroad Co., 22 Barb. 278.

[3] 2 Wall. 35.

Mr. Justice Miller, in delivering judgment, said: "It must be conceded that such is the general doctrine on the subject as applicable to cases tried under the common-law form of the action of ejectment.

"One reason why the verdict cannot be made conclusive in those cases is obviously due to the fictitious character of the action. If a question is tried and determined between John Doe, plaintiff, and A B, who comes in and is substituted defendant in place of Richard Roe, the casual ejector, it is plain that A B cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the demise may be laid from the same lessor, for there is no privity between John Doe and John Den. Hence, technically, an estoppel could not be successfully pleaded so long as a new fictitious plaintiff could be used. It was this difficulty of enforcing at law the estoppel of former verdicts and judgments in ejectment, that induced courts of equity (which, unrestrained by the technicality, could look past the nominal parties to the real ones) to interfere, after a sufficient number of trials had taken place, to determine fairly the validity of the title; and by injunction, directed to the unsuccessful litigant, compel him to cease from harassing his opponent by useless litigation.

"There was perhaps another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors, that they were not willing that the claim to it should, like all other claims, be settled forever by one trial in any ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title. They however did concede to those solemn actions, the writ of right and the writ of assize, the same force as estoppels which they did to personal actions in other cases."

The objection that the judgment in ejectment was not conclusive was therefore overruled.

As this subject is generally regulated by statute, and differently in the different States, we shall not pursue it further.

And cases have arisen where the former judgment invoked as a bar was rendered in an action in which the parties were nominally

the same, though the real parties were different. In such case the judgment has been held no bar.[1] The case cited was an action in the name of the president of the Orphans' Court for the use of Eshelman and his wife, to recover a distributive share of the estate of the wife's father. To this suit the defendant pleaded in bar a former judgment against himself for the same matter, recovered in the name of the then sitting president of the Orphans' Court, for the use of one Herr, trustee of Eshelman, the present plaintiff. In the court below the plea was held good; but on appeal judgment was reversed.

Gibson, C. J., said that it was true the former suit, like the present, was brought nominally by the president of the Orphans' Court; but for the use of Eshelman's assignees. He said that it was only by virtue of the maxim *communis error facit jus* that the president of the Orphans' Court could sue at all, in such a case; but though it would be mischievous now to doubt the validity of it, it would be as much so to let it stand in the way of substantial justice, for the sake of technical congruity.

Under certain circumstances interested persons are held bound by judgments when they were not in point of fact parties to the proceedings, by the giving them due notice of the suit. In Love *v.* Gibson,[2] the plaintiff sued the defendant for contribution as co-surety in a bond. It appeared that the obligees had sued the plaintiff alone on the bond; and that he thereupon gave notice to the present defendant, his co-surety, of the pendency of the suit. The defendant denied his liability upon the bond; contending that as he was not a party to the former suit, the judgment did not bind him. But the court held him estopped.

The court referred with approbation to the language of Mr. Justice Buller in Duffield *v.* Scott,[3] where he said: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action is not bound to pay the money." Several other leading authorities were also cited, showing that the doctrine was

[1] Eshelman *v.* Shuman, 13 Penn. St. 561.

[2] 2 Fla. 598.

[3] 3 Term, 374.

well settled.[1] The court then stated the rule as follows: "If the surety has notice of the suit, and he does not choose to defend it, he thereby waives all the defences he might otherwise have to the introduction of the instrument to be introduced in evidence; and his right is gone to contest its validity in a collateral way in a suit brought by the co-surety for contribution, for it must be deemed *res judicata*."

The rule as to the effect of notice to third persons to appear and defend suits, the result of which may affect them, is thus stated by Bell, J., in Littleton *v.* Richardson:[2] "When a person is responsible over to another, either by operation of law, or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." That was the case of a party who had placed obstructions in a highway; who, being answerable to the town, was held bound by a judgment in favor of a traveller against the town, which had given him notice of the suit.

The rule in this case is cited with approbation in Boston *v.* Worthington,[3] and in Chamberlain *v.* Preble.[4] In the latter case

[1] Smith *v.* Crompton, 3 Barn. & Ad. 407; Kip *v.* Brigham, 6 Johns. 158; Swarthout *v.* Payne, 19 Johns. 294; People *v.* Judges of Monroe Co., 1 Wend. 19; Clark *v.* Carrington, 7 Cranch, 308, adding the proviso that the judgment must have been fairly and honestly obtained. See also Milford *v.* Holbrook, 9 Allen, 17; Annett *v.* Terry, 35 N. Y. 256; Thomas *v.* Hubbell, 15 N. Y. 405; S. C. 35 N. Y. 120; Chicago *v.* Robbins, 2 Black, 418; Huzzard *v.* Nagle, 40 Penn. St. 178; Carlton *v.* Davis, 8 Allen, 94; Tracy *v.* Goodwin, 5 Allen, 409; State *v.* Roswell, 14 Ohio St. 73; Lipscomb *v.* Postell, 38 Miss. 476; Lyon *v.* Northrup, 17 Iowa, 314; McNamee *v.* Moorland, 26 Iowa, 96; Dane *v.* Gilmore, 51 Maine, 544; Brown *v.* Bradford, 30 Ga. 927; Knapp *v.* Marlboro, 34 Vt. 235.

[2] 34 N. H. 179, 187.

[3] 10 Gray, 496. See also Lee *v.* Clark, 1 Hill, 56; Rapelye *v.* Prince, 4 Hill, 119; Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275 (1866), holding that where there is a covenant to indemnify against claims and suits, judgment against the principal will be *prima facie* evidence against the indemnitor, even without notice. In this case, the court, Smith, J., say: "Covenants to indemnify against the consequences of a suit are of two classes: 1. Where the covenantor expressly makes his liability depend on the event of a litigation to which

[4] 11 Allen, 370.

the plaintiff sued upon a breach of warranty in a conveyance of real estate in fee simple; the breach being that one Comer had recovered judgment against the plaintiff as tenant by the curtesy of the premises. In support of his action, and to show paramount title in Comer in the land conveyed with warranty by the defendant to one Baldwin, under whom the plaintiff claimed by warranty deed, he produced the judgment mentioned, recovered by Comer in a writ of entry. It appeared that when that suit was brought, the present plaintiff notified Baldwin, who assumed the defence, employed counsel, and notified the present defendant, Preble (Baldwin's grantor), of the pendency of the action, and requested him to assume the defence. It did not appear that Preble took any part in the defence. The judgment was held conclusive upon him, though entered upon an agreed statement of facts, and though there was an erroneous recital as to some of the facts; provided the facts were agreed to in good faith.[1]

The question whether one who appeared as a witness in a former action is estopped by the judgment in a subsequent suit between one of the parties and the witness has arisen, and has been decided in the negative.[2] Yorks *v.* Steele, just cited, was an action to recover possession of a horse. The plaintiff was nonsuited at the trial on the ground that he was estopped from prosecuting the defendant for the recovery of the horse, by having appeared as a witness for the present defendant, in an action brought by the defendant against a sheriff who had taken the horse in execution in favor of another against himself, the present plaintiff.

he is not a party, and stipulates to abide the result; and, 2. Where the covenant is one of general indemnity merely, against claims or suits. To the latter class belongs the case now before us. In cases of the first class, the judgment is conclusive evidence against the indemnitor, although he was not a party, and had no notice; for its recovery is the event against which he covenanted. Patton *v.* Caldwell, 1 Dall. 419. In those of the second class, the rule already stated applies, to wit, that the want of notice does not go to the cause of action, but judgment is *prima facie* evidence only against the indemnitor; and he may be let in to show that the principal had a good defence to the claim."

The common case of guarantor and surety belongs to this class. See Drummond *v.* Prestman, 12 Wheat. 516; Douglass *v.* Howland, 24 Wend. 35; King *v.* Norman, 4 Com. B. 884.

But the judgment against the principal is conclusive of the amount due in an action against the surety or guarantor. Bergen *v.* Williams, 4 McLean, 125.

[1] See also as to the matter of notice to warrantor, Blasdale *v.* Babcock, 1 Johns. 517; Kelly *v.* Dutch Church, 2 Hill, 105; Collingwood *v.* Irvin, 3 Watts, 306; Paul *v.* Witman, 3 Watts & S. 407.

[2] Yorks *v.* Steele, 50 Barb. 397. But see Barney *v.* Dewey, 13 Johns. 224.

In delivering judgment, Mr. Justice Johnson said: "It is a general, if not universal principle, that an action and judgment between two persons shall not bind or affect a third person, who could not be admitted to make a defence, to examine witnesses, or to appeal from the judgment.[1] . . . . It is of no consequence *prima facie*, that the plaintiff was a witness for the defendant in the action brought by this defendant. He had no right, as a witness, to examine or cross-examine other witnesses, or to call other witnesses, who might have a better knowledge of the facts than himself. In short, as a mere witness, he had no charge or control of the case whatever. And, supposing that judgment was erroneous, for any reason, he had no right of appeal, and no standing by which he could be heard to correct the error."

But the rule is different in case parties thus interested are not notified.[2] In Jones *v.* Oswald, in the Court of Appeals of South Carolina, the plaintiff brought an action against the sureties of Oswald, a sheriff, on their official bond, alleging non-payment of money collected on execution. The defendants pleaded in bar a former judgment against Oswald for the same money. The plea was overruled in the court below; and the decision was sustained on appeal.

Mr. Justice Johnson said that a judgment against one of a number of joint and several obligors, without satisfaction, was no bar to a recovery against the others. Whatever might have been the effect of the recovery as to Oswald in this case, the liability of the sureties remained precisely as it was before the former trial. They were not parties to the suit, and would not have been liable in that form of action; if liable at all, it was upon the bond.

The question arose in a recent case[3] in the English Court of Exchequer which involved the nature of the relation between the master of a vessel and the owner. The plaintiff sued the owner of a ship on a bill of lading; and he pleaded a judgment on the same bill of lading against the master of the vessel, obtained by the same plaintiff. The question was finally raised by demurrer whether the judgment pleaded was a bar to the present action.

The case is a leading one of considerable importance; and we shall quote extensively from the opinion of the court pronounced

[1] Case *v.* Reeve, 14 Johns. 79; Castle *v.* Noyes, 14 N. Y. 329, 332; Greenl. Ev. § 523.

[2] Jones *v.* Oswald, 2 Bail. 214; Kramph *v.* Hatz, 52 Penn. St. 525 (1866).

[3] Priestly *v.* Fernie, 3 Hurl. & C. 977.

by Mr. Baron Bramwell. He said: "We are of opinion our judgment should be for the defendant. If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the contractee has an *election* to sue agent *or* principal, supposes he can only sue one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued and fresh proceedings be well taken against the other. Further, there is abundance of authority to show that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is the case here. . . . .

"If this, then, were the ordinary case we have mentioned, there could be no doubt on the subject. But it is said that the liability of the master of a vessel acting for his owners, and their liability where he acts for them, is different from the liabilities in ordinary cases of principal and agent, and that first one and then the other may be sued. The plaintiff's argument then, namely, that the present case is anomalous, is exceptional. When that is contended for, strong reason ought to be given for it. What is given here? It is certain that the master's liability is founded on the same considerations as that of an ordinary agent, namely, he makes the contract in his own name.[1] But it is said that for purposes of commerce it is convenient both master and owner should be suable. So it is, but why to the extent contended for more than in any other case of principal and agent? It might be hard to make a person who deals with the master run after the owner to sue him; but why, if he sues the master, should he afterwards sue the owner, merely because it is very right he should be able to sue the captain or owner? In reality no reason can be given for the distinction attempted between this and other cases of principal and agent. It is not said none could be given why in all cases of principal and agent both should be suable, but that there is no particular reason applicable to the masters and captains of ships."

The learned baron then says that the only authority for the position of the plaintiff is a passage in one of the works of Mr.

[1] Rich *v.* Coe, 2 Cowp. 636; Story, Agency, § 296.

Justice Story,[1] given on the authority of Mr. Livermore.[2] He shows that the former misunderstands the latter; and that though the case cited of Rich *v.* Coe,[3] which he pronounces of questionable authority, supports the proposition stated by Mr. Livermore, it does not support that maintained by Judge Story.

It seems clearly deducible from the foregoing cases that where an agent brings suit in his own name for a breach of contract or for a tort, in right of his principal, but not at his instance, the judgment, though in favor of the plaintiff, will not bar an action for the demand by the principal; and there is express authority for the proposition.[4] In the case of Pico *v.* Webster, just cited, an action had been brought by an agent, in his own name, for a trespass, in taking gold coin from the possession of the agent, and converting it; in which action the jury had found that the coin belonged to the principal, and had given nominal damages. The principal now sued the same defendant for the same trespass; and the former judgment was relied upon as a bar. But the court overruled the objection. "There was," they said, "no evidence, certainly no conclusive proof, that the suit of Brodie [the agent] was brought at the instance or for the use of Pico."

The effect of a judgment upon garnishment or trustee process has frequently arisen in suits by the original creditor of the garnishee or trustee against the latter. Such a case was Wetter *v.* Rucker;[5] but it appeared in that case, as matter of law, that the payment by the garnishees to the judgment creditor of their own creditor was not a compulsory, but a voluntary, payment. The court therefore held that the garnishees were not discharged.

In a subsequent case,[6] the defendant to an action for money had and received pleaded a recovery by foreign attachment, at the suit of a creditor of the plaintiff, and that the creditor had had execution. The plaintiff replied that the execution had not been executed; upon which the defendant joined issue. Verdict was found for the plaintiff, subject to the opinion of the court upon the points of law and facts involved; and the court ruled that the replication was good. They said that if the execution in the gar-

[1] Story, Agency, § 295.
[2] 2 Livermore, Agency, 267.
[3] 2 Cowp. 636.
[4] Pico *v.* Webster, 12 Cal. 140.
[5] 1 Brod. & B. 491; S. C. 4 B. Moore, 172. This point is well settled. See Drake, Attachment, § 674, and cases cited.
[6] Magrath *v.* Hardy, 4 Bing. N. C. 782.

nishment process had not been executed, the garnishee was not discharged.[1]

But if the execution was levied and satisfied, the garnishee is protected and discharged, to the extent of the amount paid, though the judgment be erroneous;[2] provided he availed himself of all defences against the attaching creditor.[3] And this too though the proceeding be in a foreign jurisdiction.[4] The original creditor of the garnishee is not, however, estopped to prove that his claim is greater than that admitted by the garnishee; otherwise it would be in the power of the latter to practise an irreparable fraud upon the former.[5]

Without pursuing this matter into detail,[6] we give the concise statement of Mr. Drake of the rules upon the subject:[7] "1. The judgment against the garnishee, under which he alleges he made the payment, must be proved.[8]

"2. It must have been a valid judgment. No payment made under a valid judgment, however apparently regular the proceedings may have been, can protect the garnishee against a subsequent payment to the defendant [i. e. the garnishee's creditor] or his representatives. Thus where an attachment was obtained against one supposed to be living in a foreign country, but who was dead when the suit was commenced, it was held that a payment made by a garnishee, under execution, was no defence against an action by the defendant's administrator; the whole proceedings in the suit being a mere nullity.[9]

[1] See Home Mutual Ins. Co. *v.* Gamble, 14 Mo. 407; Burnap *v.* Campbell, 6 Gray, 241; Brown *v.* Summerville, 8 Md. 444.

[2] Brown *v.* Dudley, 33 N. H. 511; Stearns *v.* Wrisley, 30 Vt. 661; Stevens *v.* Fisher, 30 Vt. 200; Dole *v.* Boutwell, 1 Allen, 286; Wise *v.* Hilton, 4 Greenl. 435; Killsa *v.* Lermond, 6 Greenl. 116; Anderson *v.* Young, 21 Penn. St. 443; Drake, Attachment, § 706, and cases cited.

[3] Funkhouser *v.* How, 24 Mo. 44; Gates *v.* Kerby, 13 Mo. 157; Dobbins *v.* Hyde, 37 Mo. 114; Newton *v.* Walters, 16 Ark. 216.

[4] Barrow *v.* West, 23 Pick. 270; Taylor *v.* Phelps, 1 Har. & G. 492; Drake, Attachment, *supra*.

[5] Robeson *v.* Carpenter, 7 Mart. N. S. 30; Brown *v.* Dudley, 33 N. H. 511; Tams *v.* Bullitt, 35 Penn. St. 308; Baxter *v.* Vincent, 6 Vt. 614.

[6] The reader is referred, for a full consideration of the subject, to the excellent work on Attachment, by Mr. Drake, now Chief Justice of the United States Court of Claims.

[7] Attachment, § 711.

[8] Barton *v.* Smith, 7 Iowa, 85.

[9] Loring *v.* Folger, 7 Gray, 505; Mathey *v.* Wiseman, 18 Com. B. N. S. 657. See Westoby *v.* Day, 2 El. & B. 605. Nor will a judgment against a garnishee protect him against a subsequent recovery in favor of one who had previously to the garnishment taken an assignment of the debt from the defendant in the attachment, the garnishee having notice of the assignment. Dobbins *v.* Hyde, 37 Mo. 114.

"8. The payment must not have been voluntary. Any payment not made under execution will be regarded as voluntary, and therefore no protection to the garnishee.[1]

"4. The payment must be actual, and not simulated or contrived. Thus, when certain persons were charged as garnishees, and credited the plaintiff on their books with the amount of the judgment, and debited the defendant with the same amount, but did not in fact pay the money, it was held to be no payment.[2]

"5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-matter and the parties.[3] If there be a defect in this respect, the payment will be regarded as voluntary, and therefore unavailing.[4] If however the court have jurisdiction of the subject-matter and the parties, a payment on execution under its judgment will protect the garnishee, though the judgment may have been irregular, and reversible on error;[5] and a reversal of it by the defendant, for irregularity, after payment by the garnishee, will not invalidate the payment.[6] But if the garnishee contest the jurisdiction of the court, and his objection is overruled, and judgment rendered against him, a payment made by him under that judgment cannot be collaterally impeached elsewhere, on the ground that the court had no jurisdiction. Its decision on that point is conclusive in favor of the garnishee.[7]

"6. Though the court have jurisdiction of the parties, and its judgment be valid against the garnishee, yet if the law require the plaintiff, as a condition precedent to obtaining execution, to do a particular act, and without performing the condition he obtain

[1] Wetter *v.* Rucker, 1 Brod. & B. 491, and cases cited *supra*.

[2] Wetter *v.* Rucker, *supra*.

[3] When the defendant was personally before the court, the garnishee is not interested in the matter of jurisdiction as against the *defendant;* but if he is not personally before the court, the garnishee is concerned in the question of jurisdiction both as to the defendant and as to himself. Drake, Attachment, § 693. See Wheeler *v.* Aldrich, 13 Gray, 51; Morrison *v.* New Bedford Inst. for Savings, 7 Gray, 269; Thayer *v.* Tyler, 10 Gray, 164; Pratt *v.* Cunliff, 9 Allen, 90.

[4] Harmon *v.* Birchard, 8 Blackf. 418; Ford *v.* Hurd, 4 Smedes & M. 683; Robertson *v.* Roberts, 1 A. K. Marsh. 247; Richardson *v.* Hickman, 22 Ind. 244.

[5] Lomerson *v.* Hoffman, 4 Zabr. 674; Pierce *v.* Carleton, 12 Ill. 358; Gunn *v.* Howell, 35 Ala. 144; Webster *v.* Lowell, 2 Allen, 123.

[6] Duncan *v.* Ware, 5 Stewt. & P. 119.

[7] Gunn *v.* Howell, 35 Ala. 144; Wyatt *v.* Rambo, 29 Ala. 510; Thayer *v.* Tyler, 10 Gray, 164; Pratt *v.* Cunliff, 9 Allen, 90.

execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which his payment is regarded as voluntary." [1]

A more difficult question is presented by the question whether judgment against the garnishee *without* satisfaction bars an action by his original creditor. The English doctrine in Savage's Case [2] is that attachment and condemnation are a good discharge. So in Maine, judgment against the trustee having been rendered and duly recorded is conclusive upon the creditor of the trustee to the extent of the judgment,[3] provided the judgment be final. Judgment by default will not discharge the trustee.[4] The same doctrine prevails in several other States.[5] But in some of the States the garnishee is not considered discharged without satisfaction.[6] The better opinion, however, would seem to be that the garnishee is discharged, as against his creditor, as soon as the law places him under a compulsory obligation to pay the plaintiff in attachment; otherwise he might be required to pay the same demand twice, without any default of his own.

Though it is a general principle that the payment by a garnishee of the full amount of his indebtedness will bar a proceeding against him on the debt, by his own creditor, the doctrine is to be received with this qualification, that the judgment on the garnishment process was fairly obtained. If the garnishee was guilty of any collusion or fraud, he will be liable to pay a second time.[7] In the case first cited the defendant had been cited as trustee or garnishee

[1] Myers *v.* Uhrich, 1 Binn. 25; Moyer *v.* Lobengeir, 4 Watts, 390; Oldham *v.* Ledbetter, 1 How. (Miss.) 43; Grissom *v.* Reynolds, Ib. 570.

[2] 1 Salk. 291. But in note 1 to Turbill's Case, 1 Wms. Saund. 660, it is said the garnishee "shall be quit against the other after execution sued out by the plaintiff"; and this seems to be the modern English rule. Wetter *v.* Rucker, 1 Brod. & B. 491; and other cases, *supra*.

[3] McAllister *v.* Brooks, 22 Maine, 80; Norris *v.* Hall, 18 Maine, 332; Matthews *v.* Houghton, 11 Maine, 377.

[4] Sargeant *v.* Andrews, 3 Greenl. 199. In Florida, Sessions *v.* Stevens, 1 Fla. 233. In Massachusetts execution must have issued. Meriam *v.* Rundlett, 13 Pick. 511. See also Cheongwo *v.* Jones, 3 Wash. C. C. 359. So in Maryland. Brown *v.* Summerville, 8 Md. 444. And in Pennsylvania. Lowry *v.* Lumberman's Bank, 2 Watts & S. 210.

[5] In Indiana. Covert *v.* Nelson, 8 Blackf. 265.

[6] In Alabama. Cook *v.* Field, 3 Ala. 53. In Texas. Farmer *v.* Simpson, 6 Tex. 303. In Georgia. Brannon *v.* Noble, 8 Ga. 549. See also Flower *v.* Parker, 3 Mason, 247.

[7] Whipple *v.* Robbins, 97 Mass. 107; Wilkinson *v.* Hall, 6 Gray, 568; Hall *v.* Blake, 13 Mass. 153; 2 Kent Com. (6th ed.) 119.

of the plaintiff, in an action in Connecticut against the latter, instituted subsequently to the present suit; he failed then to make any disclosure to the Connecticut court of the pendency of the action by his creditor in Massachusetts; and the court held that in view of this fact, which would have been sufficient to abate the trustee process,[1] he must pay again.

In Wilkinson *v.* Hall, above cited, the defendant, maker of a negotiable promissory note, had been served with trustee process in Vermont, after the negotiation of the note, and charged as trustee of the payee. The indorsee and plaintiff offered to prove that the defendant had knowledge of the transfer of the paper before the service in Vermont; which fact, had it there been disclosed, would have defeated the garnishment.[2]

The court said that the fact of negotiation before the service of the trustee process was most material to the right determination of the cause; and if the defendant had knowledge of the transfer, he was bound to disclose it.

A judgment discharging the garnishee for holding personal property of the principal defendant under a fraudulent and void conveyance will bar an action on the case directly against the garnishee for aiding in the same alleged fraudulent transfer of property to secure it from the creditors of the former defendant.[3]

The court in the case cited said that the validity or invalidity of the sale from the former to the present defendant was an issue between the plaintiff and the garnishee in that suit precisely as in the present. The plaintiff had failed in the contest against the garnishee; and the judgment of the court had been that the sale was valid, and consequently that the garnishee must be discharged. If the court had regarded the sale as fraudulent, the garnishee must have been charged.

Having ascertained the effect of judgment estoppel as to the actual parties to the record, let us now inquire as to the effect and operation of personal judgment against those who were not strictly or nominally parties to the former suit, but whose interests were in some way affected by it. And first of privity, which by Lord Coke is divided into privity in law, i. e. by operation of law, as tenant by the curtesy; privity in blood, as in the case of ancestor

[1] See Wallace *v.* McConnell, 13 Peters, 136; Embree *v.* Hanna, 5 Johns. 100.

[2] Barney *v.* Douglass, 19 Vt. 98; Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, Ib. 594.

[3] Bunker *v.* Tufts, 57 Maine, 417 (1870).

and heir; and privity in estate, i. e. by the action of the parties, as in the case of feoffor and feoffee. These divisions are only important, as far as this work is concerned, in defining the extent of the doctrine of privity; and as the rules of law are not different, in questions of estoppel, in these divisions, it will not be necessary to present them separately.

We shall take the admirable definition of privity given by Professor Greenleaf for our starting-point. "The term *privity*," he says, "denotes mutual or successive relationship to the same rights of property."[1] We purpose now to ascertain the application of the rule to judgment estoppels.

The doctrine is illustrated in Regina *v.* Blakemore.[2] The defendant was indicted for the non-repair of a highway, which it was alleged he was bound to do, *ratione tenuræ*, in respect of certain lands called Saw-pit. To prove this liability the record of the conviction of one under whom the defendant claimed was produced, in an indictment for the non-repair of the same premises, alleging his liability to repair, *ratione tenuræ*. And the record was held conclusive.

In Pritchard *v.* Hitchcock,[3] the plaintiff sued the defendant as guarantor of the acceptor of a bill of exchange; and the latter pleaded payment by the acceptor. The facts were, that the acceptor, when in a state of complete insolvency, had paid the amount to the plaintiff; but the money was subsequently recovered from him in an action by the acceptor's assignees in bankruptcy. The guarantor now sued contended that the payment by the acceptor to the plaintiff was a satisfaction. The plaintiff, on the other hand, urged that the recovery by the assignees was conclusive evidence against the guarantor that they were entitled to the money; and this being the case, that the debt had not been satisfied.

The court held the judgment to be evidence, but ruled that it was not conclusive. The decision shows that in the relation of guarantor and principal no privity arises; and the same is true of the relation of surety and principal, co-sureties, sheriff and deputy, and the like cases, where parties are answerable over.[4]

The plaintiff in Adams *v.* Barnes[5] brought an action to recover certain lands, in which the following facts appeared: The defendant, Barnes, had lent money to one Ingersoll on a mortgage of the

[1] 1 Greenleaf, Ev. § 189.
[2] 2 Den. Cr. C. 410.
[3] 6 Man. & G. 151; 6 Scott N. R. 851.
[4] See *ante*, pp. 65 – 70.
[5] 17 Mass. 365.

premises in question. Subsequently he brought an action against Ingersoll to recover possession; in which suit the latter pleaded usury. But judgment was given for Barnes, the present defendant; and he was put into possession by the sheriff. Afterwards Ingersoll sold and conveyed all his right, title, and interest in the premises to the present plaintiff, who brought this action to recover the premises. He offered evidence to prove usury in the original contract between Barnes and Ingersoll, his grantor; but the defendant contended that he was estopped by the former judgment; and the court sustained the objection.

Jackson, J., said that Ingersoll would have been estopped; and it was clear that the plaintiff was also estopped. It was such an estoppel as ran with the land, and extended to all who were privy in estate to either of the parties to the former judgment. Such an estoppel made part of the title to the land, and extended to all who claimed under either of the parties.

According to the statement sometimes made, that estoppels are odious, he said that when they constituted part of the assurance and title to land, as in the present case, they were founded in the strongest equity and justice. By the former judgment Ingersoll had lost his title to the land, and Barnes had acquired a right which was indefeasible as between him and Ingersoll to hold possession of the land until the debt was paid. And he said it would be highly inequitable if Ingersoll could convey to a stranger the right to bring Barnes's title again into controversy. Ingersoll, after the judgment, had no estate left in him, except the right to redeem; and his grantee could not claim any greater estate.

He stated further that the present estoppel was also founded on those principles of law which were intended to repress litigation. If the plaintiff could now contest Barnes's title under the mortgage, Ingersoll must have assigned him a mere right of action, which was prohibited by law. And again, if the plaintiff could purchase that right of action, he could sell it; and therefore if he should try this action on its merits and fail to recover, he might assign the right to another, and the assignee might, after suit, assign to a third, and so on.

In Winslow *v.* Grindal,[1] the demandant claimed certain real estate, which he had conveyed by warranty deed in 1788 to one Fairfield, who the *next year* conveyed to one Herrick, who conveyed

[1] 2 Greenl. 64.

to the defendant's grantor. To show that no property had passed to the defendant, the plaintiff relied upon a judgment obtained by Fairfield against himself (the plaintiff) in 1801, eleven years after Fairfield conveyed to Herrick, on the covenants of warranty; in which case the jury found that the defendant, now plaintiff, had not been seized as he had covenanted in the deed. It was held that the action could not be maintained.

The court said that if Fairfield himself had continued in possession of the premises, and had been defendant to this action, the plaintiff might have recovered; for, by reason of Fairfield's judgment, the plaintiff would no longer be estopped to deny that anything had passed by his deed; and Fairfield, having recovered a full indemnity, would be estopped to claim anything under the deed.[1] And the same rule would apply to all persons claiming title in the premises under Fairfield, mediately or immediately, derived *subsequently* to such recovery. But in this case the conveyance under which the defendant claimed had *preceded* the suit and recovery; and it was one of the first principles of law that when a man has granted an unconditional estate to another, it shall not be in his power, without the concurrence of his grantee, to resume or defeat the estate thus granted. Fairfield could not, ten or more years after his conveyance, defeat it by an act merely his own. Herrick's right could not be affected by the proceedings mentioned, as he was not a party or a privy to them; and therefore the defendant could not be affected by them.[2]

In Brewer *v.* Hardy,[3] the defendant in a writ of entry claimed through a judgment against Charles B. and his son, Calvin B. The demandant claimed under a deed from Susan B., to whom Charles B., her father, had, before the judgment, conveyed the land in question, reserving the use to himself and wife during life. But the court held that the judgment could not prejudice the claim of the demandant, as Susan B. was not a party to it, and could not be considered a privy in estate.

In Calkins *v.* Allerton,[4] the plaintiff brought trover for a pair of steers. The defendant justified the taking as having been done under the orders of a third person, and under the title of the latter.

[1] Porter *v.* Hill, 9 Mass. 34. See also Stinson *v.* Sumner, Ib. 143.

[2] See Perkins *v.* Pitts, 11 Mass. 125; Hamilton *v.* Cutts, 4 Mass. 349.

[3] 22 Pick. 376.

[4] 3 Barb. 171.

The plaintiff, then, to prove his title to the cattle and his right of possession, produced the record of a judgment in his favor in an action of trover brought by him against the person under whom the defendant now justified. The defendant objected, on the ground that the parties to that suit were different from those to the present; but the record was received, and held conclusive; and the Supreme Court sustained the ruling.

Mr. Justice Paige said that if the defendant sustained the relation of co-trespasser with the defendant in the former action, the record would be inadmissible; but the defendant could not be so regarded. He did not claim the cattle in his own right; he acted under the orders and as agent or servant of the former defendant. He justified under him, and under his title. The case, he said, did not authorize the inference that the present defendant knew he was a trespasser in taking the cattle. He must therefore be regarded as a privy of the defendant in the former suit; and therefore the judgment in that case must be admissible against him, and conclusive of the plaintiff's title and right of possession.

But in another action of trover,[1] to which the defendant produced a record of a judgment in his favor, in a replevin suit by him against the plaintiff's servant, for the same property, it was held inadmissible in evidence; the ground being that the plaintiff was neither party nor privy to the former suit.

The line of distinction between the two cases is plain. In Calkins *v.* Allerton the defendant justified under the title of one against whom the plaintiff had recovered judgment for the very property in question; his very justification therefore, being under one who was estopped to contest the title and right of possession, worked an estoppel against him. Had he justified under another, or claimed the property himself, this result could not have followed. In the other case the defendant claimed the property under a judgment of his own against the plaintiff's servant, in a suit in which the plaintiff had no part.

The relationship of privity does not exist between administrator or executor and heir or devisee.[2] In the case first cited, Marshall, C. J., in the Circuit Court of the United States for Virginia, said: "The defendants insist that the decree against the personal representative of George Brooks is conclusive evidence against the de-

[1] Alexander *v.* Taylor, 4 Denio, 302.

[2] Garnett *v.* Macon, 6 Call, 308; Stone *v.* Wood, 16 Ill. 177; Alston *v.* Munford, 1 Brock. 266.

visee of the existence of the debt. The cases cited by counsel in support of this proposition do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator as the legal owner of his personal property for the payment of his debts in the first instance, and is consequently the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit, cannot controvert the testimony, adduce evidence in opposition to the claim, or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir who does not claim under the executor should be estopped by a judgment against him. . . . .

"In this case, the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir, as devisee, may indeed, in a court of chancery, be united with the executor in the same action; but the decree against him would be dependent on the insufficiency of the personal estate. Since then the proceeding against the executor is in substance the foundation of the proceeding against the heir as devisee, the argument for considering it as *prima facie* evidence may be irresistible; but I cannot consider it as an estoppel. The judgment not being against the person representing the land, ought, I think, on the general principle which applies to give records in evidence, to be re-examinable when brought to bear upon the proprietor of the land."

An administrator *de bonis non* is not in privity with the representative of the deceased testator; and therefore a judgment against the former is no evidence of debt against the latter.[1] Nor is an administrator *de bonis non* in privity with his predecessor, the executor.[2] But it is otherwise of an executor of the executor.[3] This whole matter is explained by Mr. Justice Carr, with his usual force and perspicuity, in Coleman *v.* McMurdo, already cited. The learned judge there said: —

"An executor being the creature of the will, and his power

[1] Thomas *v.* Sterns, 33 Ala. 137. [2] Coleman *v.* McMurdo, 5 Rand. 51. [3] Ibid.

founded on the special confidence of the deceased, he is allowed to transmit that power to another in whom he has equal confidence. The executor of A's executor therefore is to all intents and purposes the executor and representative of it himself. But the administrator, being merely the officer of the ordinary, prescribed to him by law, and in whom the deceased had reposed no trust at all, could not transmit his office to another; but, if he died before closing his administration, it resulted back to the ordinary to appoint him a successor. So too when an executor died intestate, his administrator did not represent the testator; and in this case also it devolved on the ordinary to commit administration afresh, with the will annexed. It is the officer thus appointed whose powers we are now to examine.

"He is appointed to finish a business already commenced. It is not therefore a full and immediate administration which is committed to him, such as is granted to a temporary administrator, but an administration *de bonis non administratis*. Between himself and his predecessor there was no privity. His commission gave him power to act, and to represent the testator or intestate so far, and so far only, as then remained unadministered, 'goods, chattels, and credits, which were of the testator or intestate at the time of his death.'"[1]

It is well settled that there is no privity between executors or administrators appointed in different states or countries.[2] A striking illustration of this rule is found in Pond *v.* Makepeace.[3] The case in substance was this: The plaintiff, as administrator of Oliver Capron, under the laws of Massachusetts, brought suit in that State against the defendants on a note given to the intestate; and the defence was that an administrator, appointed under the laws of Rhode Island, but not under those of Massachusetts, had brought suit in the latter State upon the same note, obtained judgment upon default, and had execution satisfied. But the court held that the second suit was proper.

[1] See also Attorney General *v.* Hooker, 2 P. Wms. 340; Rutland *v.* Rutland, Ib. 210; Tangrey *v.* Brown, 1 Bos. & P. 310; Sergeant *v.* Ewing, 36 Penn. St. 156. And of course the administrator or executor is not stopped by a judgment against the heir, to which he was not a party. Dorr *v.* Stockdale, 19 Iowa, 269. As to *personalty*, judgment against the administrator concludes the heir. Steele *v.* Lineberger, 59 Penn. St. 308 (1868).

[2] McLean *v.* Meek, 18 How. 16. The point will be fully considered in the chapter on Foreign Judgments in Personam.

[3] 2 Met. 114.

Mr. Justice Dewey, who spoke for the court, said that the proceedings in the suit by the Rhode Island administrator were wholly without authority, and might have been defeated by an appearance and the filing of a proper plea; and the defendants, having neglected to contest the right of the plaintiff in the former suit, could not now plead it in bar of the present action, notwithstanding the satisfaction.

The doctrine of all these cases is, that judgments are only conclusive evidence upon the parties and those claiming under them; and that strangers may avoid them whenever they would otherwise be injuriously affected by them.[1]

But a distinction has been made between cases where the only fact to be established is the right of a creditor against the judgment debtor himself, and cases where such a right may incidentally affect third persons, as when a person is affected by a chain of title under a judgment, sale, and conveyance. In this case, it is held that third persons cannot impeach the judgment.[2]

In Barney *v.* Patterson, just cited, Buchanan, C. J., said: "The judgment is also objected to on the ground that it is *res inter alios acta;* the appellant not being a party to the proceedings. But the doctrine that judgments and decrees are only evidence in suits between parties and privies, though generally true, is not applicable to this case; the judgment of the Circuit Court being introduced, not as binding *per se* upon the rights of the appellant, but only as a document connected with the chain of the appellee's title, and is no more obnoxious to objection than a deed from Brown, or any other title papers, equally *res inter alios acta*, would be."

There is still another important exception to the rule that judgments only bind parties and privies. They are conclusive against third persons of the relationship established between the parties, and of the extent of the relationship. The relation of debtor and creditor, for instance, established by a judgment in favor of A against B, cannot be disputed by C; nor can the amount of the judgment debt be contradicted.[3] The judgment in this particular

[1] This rule in regard to privity does not apply to the case of persons who might possibly have claimed through a party to the former litigation, and whose interests were almost identical with those of such party, if in fact they do not claim through them. Spencer *v.* Williams, Law R. 2 P. & D. 230 (1871).

[2] Baylor *v.* Dejarnette, 13 Gratt. 152, 172; Barney *v.* Patterson, 6 Har. & J. 182, 203; Taylor *v.* Phelps, 1 Har. & G. 492. See Inman *v.* Mead, 97 Mass. 310; Secrist *v.* Green, 3 Wall. 744; Casler *v.* Shipman, 35 N. Y. 533.

[3] Candee *v.* Lord, 2 Comst. 269; Voorhees *v.* Seymour, 26 Barb. 569, 585; Sid-

establishes a *status*, and would seem to be in the nature of a judgment *in rem*.

In Candee *v.* Lord, just cited, the plaintiff having filed a bill against certain parties to set aside several alleged fraudulent judgments, which stood in the way of a judgment recovered by him against one of the defendants in the bill, the other defendants, not having been parties to judgment last mentioned, sought to impeach it. But they were not allowed to do so.

In delivering judgment, Mr. Justice Gardner said: "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one, unless he acts *mala fide*. A judgment therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others: first, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and secondly, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently, neither a creditor nor a stranger can interfere in the *bona fide* litigation of the debtor, or re-try his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor, does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors."

The following illustration will also explain the doctrine. A obtains a judgment against B, which becomes a lien upon B's real estate, a house and lot. C then sues and obtains judgment against B, and levies upon the house and lot. Finding the same insufficient to satisfy the two judgments, C cannot impeach A's judgment by denying the relationship of creditor and debtor established by it between A and B; nor can he dispute the amount of the indebtedness.[1]

Having considered the effect and operation of judgments upon parties and privies, we call attention next to the effect of inci-

ensparker *v.* Sidensparker, 52 Maine, 481. So in a suit against a surety or guarantor, judgment against the principal is conclusive evidence of the amount, though the surety or guarantor had no notice of the suit. Bergen *v.* Williams, 4 McLean, 125.

[1] See also Chamberlain *v.* Carlisle, 26 N. H. 540, 553, and authorities cited.

dental matters passed upon in former judgments; that is, matters which were not essential to the determination of the case.

In the early case of Morgan *v.* Vaughn,[1] Morgan brought a writ of error,[2] assigning that Vaughn had six years before obtained judgment against him, then an infant of fourteen years, appearing by attorney; whereas he ought to have appeared by guardian. A verdict having gone for the plaintiff in error, on the issue of infancy, Pollexfen then moved in arrest of judgment. The writ of error, he said, alleged that Morgan was only fourteen years of age at the former trial, and six years having since elapsed, he now assigns error, as before he defended, by attorney, and he was therefore estopped by his own showing. In other words, if he could not appear by attorney at fourteen, as he contends, he cannot thus appear at twenty, being still an infant. But the objection was overruled by the whole court.

It was said by the judges that there was no estoppel, because the allegation of the precise age was idle, and not traversible, and that the plaintiff in error might have alleged any other age, and the defendant could not have taken issue upon it.

They then referred to several prior cases which bear upon the point so directly that we propose to present them; and we shall do this in the quaint language of the old reports.

In the first case referred to,[3] "the lord distrains for rent the cattle of the tenant, lessee for sixty years, who pleads that the tenant made him a lease for ten years, and prays in aid, and granted. Afterwards the bargainer of the tenant, after the ten years were expired, enters. The lessee pleads his lease of sixty. Resolved he was not estopped by pleading his lease to be but ten years in his *aid prier*, because the lease, not the number of years, was material."

The second case[4] was an action for rescue. "The plaintiff declares that B held of him an house and an acre of land by ten marks, and that the plaintiff distrained, and the defendant made rescous. The defendant pleads that the plaintiff at another time brought an assize against the said B of the said ten marks, who pleaded *hors de son fee*, and the plaintiff made title that the defendant held the house, and five acres of land, and a mill, by

[1] T. Raym. 456.

[2] These questions, however, usually arise in collateral actions, as has already been seen, and as will further appear.

[3] 3 Dyer, 289, 6, pl. 59.

[4] Fitzh. Estoppel, 69, Rescous.

the services of ten marks, and so within his fee, and that the plaintiff was nonsuit, and after B leased to the defendant for years, and demands judgment, if the plaintiff shall be received to say that the ten marks are issuing out of the house and acre only. And resolved that the plea is not good, because the quantity of the services is not material in an action of rescous, but the tenure only."

The rule as finally stated was that one should not be estopped but of that of which he might have had a traverse.

The recent case of Dickinson *v.* Hayes [1] contains a clear statement of the doctrine. The action was ejectment for certain land, to which the defendant claimed title under the will of a minor between seventeen and twenty-one years of age. The will had included both personal and real estate, and the probate ran thus: "An instrument purporting to be the last will of F. H., late of M., in this district, deceased, was presented in court for probate, and, having been duly proved, was approved and ordered to be recorded." It was contended that this decree was conclusive evidence of the competency of the testatrix to dispose of her real estate by will; the law requiring a party to be twenty-one years of age to do so, but only requiring him to be of the age of seventeen years to make a will of personalty. But the court decided the other way.

"The general question," said Mr. Justice Sanford, in delivering the judgment, "before that court was, whether the instrument was the last will and testament of Frances E. Hubbard, and as such entitled to probate. This question necessarily involved an inquiry into her testamentary capacity. If she was seventeen years of age, and was of sound and disposing mind and memory, then she was legally competent to make a will, and if the instrument in question was executed, published, and attested as the law required, it was a valid will, and it was the duty of the court of probate to approve, accept, and establish it accordingly. . . . . .

"The record demonstrates that the court of probate passed upon and found all facts necessary to uphold its judgment and justify its approval of the instrument as a will; to wit, the legal capacity and mental competency of the testatrix to make *a* will, that she had made one in fact, and in due form of law, and that it was duly attested as her will. Without all these facts found,

[1] 31 Conn. 417.

the judgment had no legal basis to stand upon. Standing on them, it could not be overthrown. . . . . This record says in substance that the Court of Probate found that the testamentary paper in question was the will of Frances E. Hubbard, and consequently that she had one degree at least of testamentary capacity; but whether she was found to have had both or not the record does not, with conclusive certainty, disclose. The will must therefore operate upon something, on one kind of property or on both; otherwise it would not be a will. But to concede to it the efficacy of a will in its operation upon the personal property is all that is necessary to uphold the judgment of approval by the court."

The case of Hibshman *v.* Dulleban[1] is a leading and well-considered case upon this point. The plaintiff in that suit brought his action for a legacy; the defendants pleaded a release; the plaintiff replied *per fraudem;* and the defendants rejoined, by way of estoppel, that on the exhibition of the administration account by themselves, the plaintiff then excepted to the same, and that the release pleaded was exhibited to the Orphans' Court as a full answer and a satisfactory bar to the exception; and that it was held a good and valid release. The question was finally raised by demurrer whether the validity of the release had passed *in rem judicatam;* and the Supreme Court of Pennsylvania held that it had not.

Mr. Chief Justice Gibson, in speaking for the court, said: "The validity of the release was drawn into contest incidentally; and the point being thus incidentally decided against him, can no more prejudice his title in another court than can the decision of a surrogate or register prejudice the title of an unsuccessful claimant of administration to the estate of a decedent. Again, the point was not actually, or at least necessarily, decided. The plaintiff's exceptions to the administration account were also the exceptions of Henry Dulleban's trustees; and whether the release were good or bad was a question whose decision could not supplant a decision of them on the merits. It did not supplant it; and the gratuitous determination of a point involving the question of fraud, which had no effect there, ought to have no effect here, especially to deprive the plaintiff of a trial by jury."

A similar question arose in Dunckle *v.* Wiles.[2] That was an action of ejectment for seven acres of land; in which the defend-

[1] 4 Watts, 183. [2] 5 Denio, 296.

ant gave in evidence the record of a judgment in favor of his grantor against the present plaintiff, in an action of trespass *quare clausum fregit;* the close being a large one, and embracing the one in question. The defendant to that action, now plaintiff, pleaded that the close in question was his own soil and freehold. Issue was joined, and judgment given in favor of the grantor of the present defendant. In the court below, the record of this judgment was held a bar to the plaintiff's action; but on appeal the Supreme Court reversed the ruling.

Beardsley, C. J., speaking for the court, said that the verdict and judgment would create an estoppel on the question of title to the entire close in question, if title to that extent was shown to have been in controversy on the trial of the first suit. But no evidence, he said, out of the record, had been produced to show whether the whole, or a part only, of the close, was in question before; so that the point would have to be determined from the record.

If a close was to be regarded, said he, like a horse or an ox, as entire and indivisible, it would follow that judgment on the question of title must be conclusive as to all the land of which it was constituted. Assuming this principle as correct, a plaintiff in trespass *quare clausum fregit*, the close having been described in the declaration, and *liberum tenementum* pleaded, could only recover by proving a trespass coextensive territorially with the close as described. There would be no difficulty, however, in doing this, since upon the principle assumed the close was one and indivisible, so that a trespass upon any part would necessarily be a trespass upon the whole. But such, he said, was not the law. In trespass *quare clausum fregit*, the plaintiff might recover on proof of a trespass done to a part only of the close, although he had no right whatever to the residue; and the plea of *liberum tenementum* would be sustained by showing that the defendant had title to the place where the alleged trespass was committed, although such place was but part of the entire close to which the plea had reference. This principle was well settled.[1] He said that it must follow that as the plaintiff in the action of trespass, of which evidence had been given in the present case, might have recovered without showing an injury coextensive with the whole close de-

[1] King *v.* Dunn, 21 Wend. 253; Rich tler, 11 East, 51; Tapley *v.* Wainwright, *v.* Rich, 16 Wend. 663; Stevens *v.* Whis- 5 Barn. & Ad. 395.

scribed in the declaration, and as the defendant might have maintained his plea by proving title to that part of the close on which the supposed trespass had been committed, it was no necessary consequence of the issue that the title to the entire close was in question. The record was therefore no bar. The judgment was undoubtedly conclusive of everything necessarily involved in the issue, or of that which, falling within its limits, had come directly in question. But the title to the entire lot had not necessarily been drawn in issue, and no extrinsic evidence had been offered to show that the title to the seven acres now in question had been directly tried. The injury complained of in the former suit might have been done to another and distinct part of the close, to which part alone the plea might have had reference. In order to render the record in that case an estoppel in this, it was necessary to prove by extrinsic evidence that the title to the seven acres was directly in controversy in the former suit.[1]

An excellent case upon this branch of the subject was decided in 1850 in the Court of Appeals of New York.[2] It was an ejectment for a certain lot of land in New York City, taken by the municipal corporation for widening a street. The corporation had applied to the Supreme Court, according to the statute, to appoint commissioners to examine and report upon the subject. They did so; the Supreme Court confirmed the report; the land was taken, and conveyed to parties under whom the defendants claimed. The plaintiffs desired to show that these proceedings were void, on the ground that the legislature had assumed unconstitutional powers in passing the statute under which the property was taken; but the defendants, *inter alia*, contended that the plaintiffs were estopped by the adjudication of the Supreme Court confirming the report of the commissioners; that court having had jurisdiction to adjudicate between the corporation and the plaintiffs, and the question now before the court having then been put in issue and determined. It was held, however, that there was no estoppel.

Mr. Justice Jewett, who delivered the judgment of the court, first premised that the Supreme Court, under the street law, exercised its powers as a *court*, and not as commissioners appointed by the legislature; and that its decisions in such matters were judg-

[1] To the same effect he cited the language of Lord Tenterden, C. J., in Bassett *v.* Mitchell, 2 Barn. & Ad. 99.

[2] Embury *v.* Conner, 3 Comst. 511.

ments of the court, and subject to review on appeal; though in this particular it was a court of limited jurisdiction.[1]

He then proceeded to say that, to determine the question involved by this point, it became necessary to see what matters were referred to the Supreme Court, in street cases, for adjudication, and what were the issues between the parties; "because," to quote his language, "ordinarily the parties or their privies are only concluded by a judgment of a court upon such matters as are in issue between them in the cause or proceeding referred to it for determination."

Under the statutes there was nothing submitted to the court, he said, but the appointment of the commissioners, and the confirmation of their report. This involved only the question of the fitness of the persons named as commissioners, and the regularity of the proceedings of the corporation and the commissioners, and the justness of the estimate and assessment made and reported by the latter. The question whether the statute had the legal effect to transfer to the corporation the legal title of the owner of the lands proposed to be taken, was not, and could not be, from the nature of the case, determined by the court. And although the statute declared that the report, when confirmed by the court, should be final and conclusive upon all persons, and that the title to the land should be vested in the city government in fee simple; still this was by force of the statute, and not as an adjudication upon the question by the Supreme Court. The whole proceeding was but a mode adopted by the State to exercise its right of eminent domain, through a power confided to the corporation of New York, or its officers. The confirmation of the proceeding under the statute could in no sense be deemed an adjudication upon the *effect* of these proceedings. The order of confirmation merely concluded the parties in respect to the regularity of the preliminary proceedings, and did not conclude either party as to their effect. And whether the statute was or was not constitutional, had not been, and could not properly have been, determined by the court, so as to estop the owners from making the question in the action brought for the recovery of the premises.

The effect of a statutory pardon for acts of trespass committed in a time of rebellion, in cases of conviction pleaded as an estoppel,

[1] Striker *v.* Kelly, 7 Hill, 9; S. C. in Error, 2 Denio, 323; 2 Cow. & H. Notes, 946.

arose in Benson *v.* Idle.[1] The plaintiff in that case brought an *audita querela*, upon the following facts, as appeared by demurrer. Before the restoration of Charles 2, the defendant in the *audita querela* brought an action of trespass against the present plaintiff for taking cloth; to which the present plaintiff pleaded that he was a soldier and compelled by the military; his fellow-soldiers threatening to hang him "as high as the bells in the belfry" if he refused. The plaintiff replied *de injuria sua propria;* and judgment was given for him, and execution of the defendant's lands. Then came the act of indemnity,[2] which pardoned all acts of hostility done in the time of rebellion, and from thenceforth discharged all personal actions for any trespass committed during the wars, and all judgments and executions thereon, but without restoring property already taken by execution, or directing any account to be given of the same. This act, called The Convention, had been followed by another of confirmation;[3] and upon these two acts of parliament the plaintiff brought this *audita querela.* The defendant pleaded, by way of estoppel, the former verdict, to show that the taking was not an act of hostility.[4]

But the court were all of opinion that judgment should be given for the present plaintiff; for his remedy was very proper in the acts of Parliament. And they said that it was immaterial whether the taking was an act of hostility or not, and there was no estoppel in the case.

The case of Carter *v.* James[5] was an action of debt on an indenture of mortgage, whereby the defendant covenanted to pay the plaintiff £ 600, with interest, on a certain day. The defendant pleaded by way of estoppel, that the plaintiff had brought suit against him in a former action of debt on bond, conditioned in the penal sum of £ 1200, for the payment of £ 600 and interest; alleging it to be the same principal sum and interest as were secured to the plaintiff by a mortgaged deed of even date with the bond. The present plea further stated that the defendant in the former action pleaded an usurious agreement made between the plaintiff and himself, and averred *that the bond sued upon was given in pursuance of this agreement.* The plaintiff traversed the allegation in

[1] 2 Mod. 37.
[2] 12 Car. 2, c. 11.
[3] 13 Car. 2, c. 7.
[4] He also added a traverse on this point; so the court held that even if there had been an estoppel he had set it at large.
[5] 13 Mees. & W. 137.

italics; whereupon issue was joined, and verdict found for the defendant. The question in the present action was whether the plea was a good estoppel against the plaintiff to deny the alleged usury. The court were of opinion that it was not.

Alderson, B., said that the usurious agreement, set out in the plea in the former action, went on to state that it was agreed that a bond should be given to secure this usurious interest, and that in pursuance of that agreement the bond in question was executed for the principal and interest named in it. This latter allegation alone being traversed, the only issue the jury had to try, he continued, was whether the bond was given for the sum mentioned, of £ 600. The jury found that it had been so given; and *incidentally* it was taken for granted that if the bond was given as a security for that debt and the amount of interest alleged in the former plea, the interest so secured was usurious, according to the previous averments in the plea, which were not put in issue by the plaintiff, but admitted by him for the purposes of that suit, and for the purposes of that suit only. "If therefore," said he, "the plaintiff were to be deemed estopped now, when the point in issue was not raised at all in the former suit, he would be deemed estopped by the finding of a matter which he never disputed, and on which the jury gave no verdict, and the court no judgment.[1] I take it that the party is only estopped by the form of the record in that action from recovering on the bond, or disputing that any of the issues then determined by the jury were wrongfully decided; but that he is not estopped by any of the other facts which were taken in that case to be true merely for the purpose of deciding the question at issue."

In a case in Pennsylvania,[2] it appeared that a judgment debtor, owning two lots, sold one of them without discharging the lien upon it; and this lien was subsequently revived generally. But the court held that the vendee of the lot sold was not concluded by the judgment from asking that satisfaction be exacted from other lands of the vendor.

Questions of this character have arisen in actions for nuisance.

[1] Parke, B., also says that the material facts alleged by one party which are indirectly admitted by taking a traverse on some other fact are only conclusive in case the traverse is found against the party making it. Boileau *v.* Rutlin, 2 Ex. 665. And of course there is no estoppel as to an immaterial allegation. Sweet *v.* Tuttle, 14 N. Y. 465.

[2] McCormick's Appeal, 57 Penn. St. 54.

In the case of Richardson *v.* Boston,[1] in the Supreme Court of the United States, the plaintiff sued in trespass for the erection and maintenance of a drain as a nuisance to his property. The defendant pleaded the general issue; whereupon the plaintiff offered in evidence the record of a former verdict and judgment in his favor for the same nuisance, the continuance of which was the subject of the present action. The record was held inconclusive.

Mr. Justice Grier, who delivered the judgment, said: "The plea of the general issue, in actions of trespass or case, does not necessarily put the title in issue; and although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in another action for a different trespass. The judgment can only give the plaintiff an ascertained right to his damages, and the means of obtaining them."[2]

There is a *dictum* by Lord Chelmsford[3] to the effect that a distinction exists between the judgments of courts of concurrent and courts of exclusive jurisdiction, in respect to the effect of matters incidentally involved in a case. "The judgments," he says, "of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly [i. e. directly] in issue between the same parties. The judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly in issue." But it may well be doubted whether any such distinction can properly be drawn. The ground for it is not apparent. The reason why, in the one case, parties are not estopped as to incidental matters, that such matters are not presumed to be examined with great care and thoroughness, is equally applicable in the other case, and seems decisive against the distinction.

The above cases are perhaps sufficiently various to fully illustrate the rule that a judgment works an estoppel only as to matters essential to the decision of the case. Other authorities are also cited in the note.[4]

[1] 19 How. 263.

[2] And this is the doctrine of the courts of Ohio and Massachusetts. Courtland *v.* Willis, 19 Ohio, 142; Standish *v.* Parker, 2 Pick. 20; S. C. 3 Pick. 288.

[3] Mackintosh *v.* Smith, 4 Macq. 913, 924.

[4] People *v.* San Francisco, 27 Cal. 655; People *v.* Johnson, 38 N. Y. 63; Hadley *v.* Albany, 33 N. Y. 603; Tams *v.* Lewis, 42 Penn. St. 402.

See also Rogers *v.* Ratcliff, 3 Jones, 225, in which it was held that a verdict upon a fact put in issue by a special plea was not conclusively determined, when there was, by the same verdict, a finding for the defendant, upon the general issue; the reason stated being that the finding for the defendant, upon the general issue, fixed the fact that the plaintiff had no cause of action, and consequently it was

But the question, what is to be considered the point in issue, within the meaning of the rule, is one of some difficulty. Does the rule mean that the judgment is conclusive upon every point which by the evidence in the action became necessary to the decision of the case? Or does it mean that it is conclusive only of such matters as *in themselves* were necessary to the decision, — that is, only of the main question and its consequences, — in contrast with such matters as *in themselves alone* involved questions foreign to the cause of action, but which in the position of the case became necessary to its decision. There is some conflict upon the subject. Without attempting to follow the trackless and conflicting course of the many cases upon this point, we shall be content with the presentation of one clearly cut decision, and the addition of our own view of the question.

Chief Justice Parker, after quoting the rule from the Duchess of Kingston's Case, in the case of King *v.* Chase,[1] which involved this question, said: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special.

"But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non*

unnecessary to investigate the matter of the special plea. See Burwell *v.* Cannaday, 3 Jones, 165.

[1] 15 N. H. 9.

est factum involved in the matters put in issue by the plea of *nul disseizin*, or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact the one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly, in one sense ; that is, in the course taken by the evidence it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties.

" This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first. It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded ; and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied if the plaintiff had title. That matter is settled. The verdict and judgment may be given in evidence in another action for the oats, between those parties, and is conclusive ; but that is the extent of what was in issue.

" It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue. But this was only a controversy about a particular matter of evidence, upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats, against the same defendant, and, relying upon some other title than that mortgage, try the title to the oats over again. Can he do so ? Clearly not, and the reason is, that it is his title which has been tried, and he is concluded. . . . . The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title ; but the mortgage was not in issue.[1] . . . .

" There are cases which conflict to some extent with the principle

[1] Towns *v.* Nims, 5 N. H. 263.

we have thus stated; some of them holding that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted that under such a record any particular matter came in question; while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself; provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury.[1]

"While, on the one hand, we do not, with the Supreme Court [of New York, in the case just cited], deem it essential that the record should of itself show that the matter was in issue, in order to make the determination of it conclusive, we are of opinion, on the other, that the general principle laid down in the Court of Errors is too broad, in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question, and passed upon by the jury; as this must include all matters which came in question collaterally, by the evidence offered, if they were of such a nature as that it appears that the jury must or should have passed upon them."

We have given Chief Justice Parker's opinion thus fully, that the reader may get the full force of perhaps the most ably considered case upon that side of the question. We are not, however, convinced by the learned judge's reasoning. The decision is not only contrary to the doctrine of many of the leading authorities,[2]

[1] Jackson *v.* Wood, 3 Wend. 27; S. C. in error, 8 Wend. 9.

[2] Outram *v.* Morewood, 3 East, 346; Burt *v.* Sternbergh, 4 Cow. 559; Wood *v.* Jackson, 8 Wend. 9. But see Leutz *v.* Wallace, 17 Penn. St. 412, — an action for necessaries furnished a wife and child. To prove that the wife had been turned out of doors, the plaintiff offered in evidence the record of a former action by himself for necessaries against the same defendant, which suit had turned upon the very same point, that the wife had been turned out of doors, and which point had been decided in the plaintiff's favor. But the record was excluded, on the alleged ground that the question had not been directly in issue in the former suit.

but an examination of the rule of *res judicata* will show its infirmity. This rule is based on the ground that there has already been a fair and full trial of the matter, which one or the other party is endeavoring to litigate again; and the reason why there is no estoppel as to matters not necessarily involved in the decision of the case is that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue, the decision of which would determine the case. But just so soon as any matter, though in itself alone foreign to the cause of action, has become vital to the determination of the case, and the pivot on which the case turns, at that moment it absorbs within itself the entire case; the ground of action is lost in it for the time; and the whole force of evidence, examination, analysis, and argument are directed to the solution of the issue made by it. The main question in the cause, if it had distinctly arisen alone, could not have received a more thorough investigation; and the matter itself, thus in issue, would command as careful a consideration as if it had been the main and only question in controversy. In the case of the mortgage in King *v.* Chase, *supra*, the validity of the instrument would undoubtedly be as thoroughly considered in the action of trover as if a direct action had been brought between the parties to it to cancel it. If this is true, we see no reason why the decision in the action of trover should not be conclusive upon the validity of the mortgage in all subsequent actions between the parties.[1] But we should make it a criterion of the conclusiveness of the verdict upon such a matter, that it clearly appear that the whole case turned exclusively upon its decision, so that it must have received as thorough an investigation as in a suit brought for the specific purpose of deciding the point; for if it should appear that it might have been determined the same way upon other grounds also, there could then be no certainty that the decision of he point relied on as an estoppel had received a full examination, such as an estoppel is presumed to rest upon. And such a case would be presented upon a general verdict, unexplained, involving several diverse issues. That we may not be misapprehended, let

[1] The Supreme Court of the United States seem to have gone still further than this in the recent case of Aurora City *v.* West, 7 Wall. 82; deciding that a judgment is conclusive of all matters which might properly have been considered in the case. See 2 Taylor, Evidence, § 1513.

us take for illustration an action in ejectment, and suppose, first, that the defendant relies solely upon a mortgage from the plaintiff, letting him into possession, and verdict for the plaintiff; secondly, that the defendant relies both upon the mortgage and a deed from the plaintiff's ancestor, and general verdict for the defendant. In the case first put, we should say that the validity of the mortgage had received as exhaustive an examination as it was capable of; and we can see no good reason why the verdict should not be conclusive in a suit in chancery between the parties to have the mortgage cancelled as a cloud upon the plaintiff's title. But the second case is entirely different. The decision may have rested on the ground of the validity of either the deed or the mortgage; and we cannot see how, in a suit to cancel either or both, this verdict, unexplained, could be an estoppel. The certainty upon which alone an estoppel can exist is wanting. But if it is once established, beyond all doubt, that the whole case turned upon the validity either of the mortgage or of the deed exclusively and independently, this should end the controversy forever. Of course, if the verdict is special the same conclusion follows.

We make no mention here of the question of the conclusiveness of a judgment upon a point pretermitted, which might have been put in issue; the subject will be considered in the following pages.

We come now to the consideration of matters not passed upon in the former judgment. Such a point arose in an action in the King's Bench, to recover the proceeds of certain bags of clover.[1] The defendant pleaded an award; to which the plaintiff replied that the subject-matter of the present suit was not included in the reference; and issue was joined on the replication. The plaintiff was allowed, in the court below, to prove that the matter of the present action had not been laid before the arbitrators; upon which he obtained a verdict. Motion was then made by the defendant to set aside the verdict, and for a new trial, on the ground that the terms of reference, being "all matters in difference," were conclusive on the parties as to all causes of action subsisting between them prior to the submission; of which the subject-matter now in question was one. But the motion was refused; the court assigning no ground for the decision.

In the court below, a case was alluded to precisely similar.[2] In that case the defendant, among other things, pleaded that an action

[1] Ravee *v.* Farmer, 4 Term, 146. [2] Golightly *v.* Jollicoe, Ib. note.

had been brought by the plaintiff for some other matter, in which all matters in difference had been referred; that the arbitrator ordered several sums to be paid, and that the parties should give general releases; and that the defendant did pay the money, and that the releases were given. The plaintiff replied that the present matters were not before the arbitrator, to which the defendant demurred. Lord Mansfield said that the only question was whether a submission of all matters in difference was a submission of matters *not* in difference; and judgment was given for the plaintiff.

A similar principle decided Seddon *v.* Tutop.[1] The action was for goods sold and delivered; to which there was a plea of former recovery. The plaintiff replied that he was now suing on different promises; and from the evidence it appeared that the plaintiff in the former suit had declared on a promissory note, *and for goods sold;* but that on executing a writ of inquiry he gave no evidence on the count for goods sold, taking his damages for the amount of the promissory note only. It was held that the judgment was not a bar to the present suit.

Lord Kenyon, C. J., said: "There cannot be two opinions respecting the justice of this case. It is admitted that the plaintiff had two demands against the defendant, the one on a promissory note, the other for goods sold; that on executing the writ of inquiry in the former action, evidence was only given on the first demand; that the plaintiff recovered damages adapted to that demand; and that the other demand for the goods still remains unsatisfied. . . . . The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not. The case of Markham *v.* Middleton[2] is extremely different from the present. There the plaintiff had but one demand; and though the jury gave inadequate damages for that demand on account of the plaintiff's not being prepared with proof of his whole bill, he would have been barred by that verdict if it had stood. But in this case there were two distinct demands, not in the least blended together; and though the plaintiffs might in the first action have proved this demand, owing to inadvertence they did not; and the recovery on the note in that action is no bar to their demand in this, which is for goods. In truth, this is a question of great delicacy; we must take care not to tempt persons to try experiments in one action,

[1] 6 Term, 607. [2] 2 Strange, 1259.

and, when they fail, suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action be the same; he ought to show beyond all controversy that the second is a different cause of action from the first, in which he failed. In this case it is clearly shown that the demand was not inquired into in the former action."

In Webster *v.* Lee,[1] the question arose whether a promissory note not due must have passed under consideration in the case of a submission of "all demands between the parties." The court allowed the fact to be proved that the note was not laid before the arbitrator.

Parsons, C. J., said that either party might prove what demands then existed. That a promissory note was a demand to certain purposes, he said, could not be denied. Yet it might well be questioned whether a submission of all demands to arbitrators included an acknowledged debt not in controversy, and concerning which there was no difference or dispute. If, he continued, it was a fair construction of such a submission, that it included all matters *in difference*, then either party might prove that a particular demand was not laid before the arbitrators, and so was not a matter in difference between the parties. But as either party might submit to the arbitrators all demands, the presumption was that all demands were in fact submitted; but the presumption might be disproved.

But without deciding that an agreement to refer "all demands" was subject to the same construction as a submission of "all matters in difference," the chief justice said that it was manifest that an agreement to refer might not be executed; and he said that evidence might be received to show the fact.

And where, to an action upon a note, the defendant pleaded a former judgment thereon, and the fact was that in the former action the plaintiff sued upon this note and another, but that he withdrew the note in question before judgment, it was held that the action was sustainable; though in fact the court, acting as a jury, in the former suit, expressed an opinion in favor of the plaintiff on both notes.[2]

[1] 5 Mass. 334.

[2] Wood *v.* Corl, 4 Met. 203. So the maker of two notes, having a common defence to each, but having failed to plead it in an action upon one of the notes, is not estopped thereby from pleading it when sued upon the other note. Hughes *v.* Alexander, 5 Duer, 488. See Treadwell *v.* Stebbins, 6 Bosw. 538; Clark *v.* Sammons, 12 Iowa, 368; Freeman *v.* Bass, 34 Ga. 355; Maghee *v.* Collins, 27 Ind. 83. See also Hooker *v.* Hubbard, 102 Mass. 239.

The same principle is illustrated in White *v.* Moseley.[1] That was an action of trespass *quare clausum fregit*, for tearing down a mill-dam. The defendants pleaded a former recovery; to which the plaintiffs replied that that was for a different cause of action. Issue was joined on the replication. It was admitted that the act complained of in the former suit was the passing over the mill-lot by the defendants, after they had returned from the opposite side of the river, where they had torn down the dam. They contended that the trespass now sued for was one and the same, or at least a part of the same trespass, as that sued for before. The defence was overruled in the court below; and that decision was sustained on appeal. The ground taken was that the trespasses were distinct and independent. The court said that if the defendants had gone upon the mill-lot in order to complete their design of destroying the dam, there would have been but one trespass; and the circumstance, in such case, that they had passed over the land of a stranger (which was the fact) in going from one close to the other would have been immaterial. But they said the object of the defendants seemed to have been to destroy the dam; and this was effected before they recrossed the stream.

In Loring *v.* Mansfield,[2] the plaintiff sued to recover the amount of a partial payment which he alleged he had made upon a note of his held by the defendant, and which had not been allowed in a former suit by the defendant upon the note. The present plaintiff appeared and defended that suit, but then said nothing of the alleged partial payment now in question. The court held that the action could not be maintained; distinguishing the case from the prior cases of Rowe *v.* Smith,[3] and Fowler *v.* Shearer.[4] The point of distinction was that in those cases the judgment was obtained by default; that there was a trust and confidence between the parties; and that the defendant had a right to expect that the plaintiff in taking judgment would make the allowance of the payment. But in the present case the plaintiff was present and defended the former action, and should have alleged and proved the payment in question. The case of Moses *v.* Macferlan[5] was also distinguished by the fact that the defendant could not avail himself, by way of defence against the judgment, of the matter

[1] 8 Pick. 356.
[2] 17 Mass. 394.
[3] 16 Mass. 306.
[4] 7 Mass. 14.
[5] 2 Burr. 1005.

now sued upon; whereas in the present case, the plaintiff had a remedy by review. Marriott *v.* Hampton[1] was also referred to as a much stronger case than the present; in which case it appeared that the evidence of payment had not been voluntarily withheld. The receipt had been mislaid, and there was no other proof of the payment; so that the defendant could not have defended himself at the former trial. But the court thought the rule inflexible, and refused to sustain the action.

In a recent case in the Supreme Court of New York,[2] it is said that this case of Loring *v.* Mansfield overrules Rowe *v.* Smith, above cited. In Binck *v.* Wood, the case referred to, the maker of a promissory note had made a partial payment upon it, which had not been indorsed. The payee sued upon the note, and recovered judgment for the full amount; the maker not defending. A surety in the note, having paid the judgment, took an assignment of it, and brought an action to recover the amount of the partial payment; but the court held the action not sustainable. The case of Smith *v.* Weeks[3] was overruled. The court said that this case found no support in New York or in England, or in any of the States to whose authorities they had been referred, except in Rowe *v.* Smith, which, as has been said, was considered as overruled.[4] "The law," said they, "cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the summons or complaint he had expressly notified this plaintiff he would do, namely, take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed." And this seems to be the better opinion.[5]

In Burwell *v.* Knight,[6] a still more recent case, the plaintiff sued upon a demand which he had alleged as a defence in a former action by the defendant. But the plaintiff, then defendant,

[1] 7 Term, 269.

[2] Binck *v.* Wood, 43 Barb. 315. Peckham, J.

[3] 26 Barb. 463.

[4] The following cases were cited: Tilton *v.* Gordon, 1 N. H. 33 [overruled by Snow *v.* Prescott, 12 N. H. 535]; Broughton *v.* McIntosh, 1 Ala. 103; Mitchell *v.* Sanford, 11 Ala. 695; Loomis *v.* Pulver, 9 Johns. 244; White *v.* Ward, Ib. 232; Battey *v.* Button, 13 Johns. 187; Walker *v.* Ames, 2 Cowen, 428; Dey *v.* Dox, 9 Wend. 129; Le Guen *v.* Gouveneur, 1 Johns. Cas. 436; Marriott *v.* Hampton, 7 Term, 269; Kist *v.* Atkinson, 2 Camp. 63.

[5] To the same effect, Corey *v.* Gale, 13 Vt. 639.

[6] 51 Barb. 267.

did not appear upon the trial, and judgment was given upon the testimony alone of the opposite party. The court held the judgment no bar. In declaring a rule, they said, though the pleadings presented the same claim, still if no testimony was given in support of it, and it was not submitted to the court or jury, it would not be barred, unless it was a claim which the party was bound to present and litigate in the former suit.[1] These cases seem difficult to reconcile. The better opinion and the tendency of the courts, however, favor the rule in Binck *v.* Wood.

Florence *v.* Jenings[2] was another and a recent case upon this subject. The action was for a certain sum of money, stipulated to have been given as interest, at the rate of £ 20 per month, in case of default in paying a certain bill of exchange. The facts were that the plaintiff discounted for the defendant a bill for £ 250, drawn by the latter on one D'Arcy, and accepted by him; he and the defendant at the same time signing the following memorandum, addressed to the plaintiff: "Sir: In consideration of your discounting the under-mentioned bill, we do jointly and severally undertake, if the same is not wholly paid at maturity, to pay, *as interest thereon*, £ 20 for each month, any portion of which shall have elapsed after maturity of the said bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written, "£ 250. Jennings on D'Arcy at three months." This bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming interest at the rate of £ 20 per month, according to the above agreement; but declaring only upon the bill; upon which he obtained judgment. Afterwards he brought the present action for the sum of interest due according to the memorandum. Issue was finally joined upon demurrer by the defendant; the ground of the demurrer being, that as the plaintiff had recovered damages for the non-payment of the bill, and had voluntarily forborne to take judgment for the stipulated interest, he could not bring a second action for such interest.

The court allowed the plaintiff interest to the date of the judgment, but denied it to him after that time. Cockburn, C. J., in pronouncing judgment, said that the interest due under the contract, though constituting a distinct debt, and properly declared for in a count upon the agreement, or for interest, was only a substitute for the interest ordinarily recoverable as damages upon a

[1] See Snow *v.* Prescott, 12 N. H. 535. [2] 2 Com. B. N. S. 454.

bill. Therefore when judgment had been recovered, and the claim upon the bill had become *res judicata* (so that any further interest payable would be upon the judgment, under the statute, and not upon the bill), the right to interest upon the agreement ceased. But as to the interest which accrued prior to the judgment, the case, he said, was different. It was clear that the plaintiff had not recovered the interest now claimed; and looking at the declaration, which determined the scope of the former action, the plaintiff could not have recovered such interest in that action, for want of a count upon the agreement, or for interest.[1]

In a case in Maine[2] it appeared that the plaintiff had some years before erected buildings on his wife's land. Upon her death her heir at law recovered judgment for the land in a real action against the plaintiff, and entered into possession under the judgment. The plaintiff subsequently brought the present suit against the heir to recover the value of the buildings. But the action was not sustained.

Tenney, J., said it was the plaintiff's duty, in the former action, to defend and protect all his rights. Whether he had then set up his rights by betterment claim or otherwise did not appear, and was of no importance. The judgment and possession were a bar to the present suit.

Upon the principle in the above cases, a debtor cannot bring an action to recover illegal interest, after judgment on a note for the full amount.[3] So where one brings an action for the rent of a certain period, and obtains judgment for only part of the time, this will bar an action for the residue.[4] In the case cited, Mr. Justice Wilde thus epitomized the law upon this point: "The law is perfectly settled, that when a party brings an action for a part only of an entire and indivisible demand, and obtains judgment, he cannot subsequently maintain an action for another part of the same demand."[5] And it is immaterial whether this was done intentionally or by mistake.[6]

There has been some conflict as to the question whether a cross-action can be maintained by an employer for the negligent or im-

[1] See Florence *v.* Drayson, 1 Com. B. N. S. 584.

[2] Doak *v.* Wiswell, 33 Maine, 355.

[3] Footman *v.* Stetson, 32 Maine, 17.

[4] Warren *v.* Comings, 6 Cush. 103.

[5] Smith *v.* Jones, 15 Johns. 229; Willard *v.* Sperry, 16 Johns. 121; Phillips *v.* Berick, 16 Johns. 136; Miller *v.* Covert, 1 Wend. 487.

[6] Wickersham *v.* Whedon, 33 Mo. 561.

proper performance of services after an action by, and judgment in favor of, the person performing, in which the defendant omitted to allege the ill performance; and the same question arises in the case of the sale of goods which fail to correspond with the warranty. Can the vendee, after suit by, and judgment in favor of, the vendor, in which the inferiority of the goods was not set up, maintain a cross-action for the breach of warranty? The question in the form first suggested arose in the recent case of Gates *v.* Preston.[1]

The plaintiff in that case sued a surgeon for negligent performance of professional service; and the defendant relied upon a judgment in his own favor in an action for the value of his services, in which case the defendant, now plaintiff, had confessed judgment without trial. The Court of Appeals ruled that the judgment was a bar.

"In such a case," said the court, "the right of action (there being no denial thereof) is by implication admitted; and when there is, in the answer of the defendant, an express and direct admission by him of the plaintiff's right to recover, and a consent to the entry of a judgment for a certain amount, it is an admission on the record of all the facts which the plaintiff would have been bound to prove on a denial of the cause of action alleged by him in his complaint."

The court rested the doctrine on the decisions of the same court in White *v.* Merritt,[2] and in Davis *v.* Tallcot.[3] In the first of these cases the plaintiff sued the defendants for damages for a violation of duty in the collection of a bill, and for false and fraudulent representations concerning their connection with it, whereby the plaintiff had been drawn into an unfortunate litigation. The defendants relied upon a judgment in their favor in an action by them to recover for an advance made in behalf of the very transaction in which the bill was given. In this action the plaintiff, then defendant, had been prevented from making his defence of violation of duty by the false representations of the present defendants, and had allowed judgment to go against him, and had paid the same. There was a demurrer to this defence; but the demurrer was overruled and the defence held good.

Mr. Justice Welles, in delivering judgment, said: "By the judgment it is established that it was legal and proper that the plaintiff should pay the defendants the amount of their advance

[1] 41 N. Y. 113 (1869). [2] 7 N. Y. 352. [3] 12 N. Y. 184.

with the interest and commissions, which is utterly inconsistent with the plaintiff's claim to recover it back.[1] No averment is to be admitted to contradict a judgment or to dispute any legitimate inference deducible therefrom. . . . . To sustain this action to recover back the advance would be to open the judgment and inquire into its propriety and legality. That cannot be done collaterally."

The case of Davis *v.* Tallcot, above cited,[2] belongs to the second class mentioned at the beginning of the subject under consideration. It was an action for breach of contract to furnish machinery of a specified kind and quality. The defendants, as in the preceding case, relied upon a judgment in their favor in an action for the price of the machinery. In that action the present plaintiffs had at first pleaded the breach now sued for; but before the trial they withdrew the defence, and confessed judgment. The court held the judgment a bar to the present action.

Gardner, C. J., observed, speaking for the court: "It is obvious that, by withdrawing their claim to damages, the then defendants did not waive their right to insist upon their defence. The plaintiffs, notwithstanding, must have established their title to the price stipulated, by proof that the machinery was made within the time and in the manner called for by the agreement; and the vendees were at liberty to meet and combat these proofs by counter-evidence on their part. Now this is precisely what was done; or rather the necessity for introducing evidence to sustain the action was superseded by the admission of the then defendants in open court, 'that they were indebted to the manufacturers for the causes of action mentioned in their complaint.' As the cause of action and the indebtedness of the defendants were, by the complaint, made dependent on a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect; and the report of the referee, followed by the judgment of the court, consequently estops the parties to that suit from ever after questioning that fact in any controversy arising upon the same agreement."

[1] This, it would seem, was not the object of the present suit; the purpose, as it would seem from the reporter's statement, was to recover damages for the violation of duty in occasioning the loss of the bill, and in getting the plaintiff into a bad suit. Indeed, the learned judge himself so states the nature of the proceeding on the next page.

[2] 12 N. Y. 184.

But the doctrine of these cases has lately been denied in a case in the Superior Court of Cincinnati.[1] The plaintiff in that case sued the defendant, a physician and surgeon, for "carelessly, negligently, and improperly" treating her arm; to which action the defendant pleaded a judgment in his favor, before a justice of the peace, in an action against the present plaintiff to recover for his services in attending the plaintiff for her arm. To that action, the plaintiff, then defendant, did not appear, though duly served with notice. A demurrer was entered to the plea; and the demurrer was sustained.

Said Mr. Justice Hagans, for the court: "In looking into the justice's record, it appears that the judgment against the plaintiff for the professional services of the defendant was taken by default, and on the testimony of the defendant himself only. It was certainly not necessary, in order to entitle the plaintiff in that case to recover, that he should prove that he was not guilty of any negligence in his professional treatment. It was enough to show simply that he performed the services at the defendant's request, and their value, and the fact that the amount was due. There were no pleadings and no issues. There is nothing in the record to show that the question of negligence was involved. Now it is argued on the authority of Gates *v.* Preston[2] (which is a case exactly like the present, except that there the defendant, before the magistrate, consented in writing to a judgment), that the judgment recovered for the services before the magistrate is a direct admission on the record by the plaintiff in this case of all the facts which the plaintiff before the magistrate would have been bound to prove on a denial of the cause of action alleged there; and that the recovery by the plaintiff there was dependent on a full performance of his duties in the treatment of his patient; and that the plaintiff here is estopped from questioning that fact in any controversy on the same agreement for services.

"We do not see how the plaintiff, in the case before the magistrate, was bound to prove that he was guilty of no negligence in his treatment of the arm before he could recover for his services therein. It was enough to prove the services and their value. We are inclined to think with Judge Daniels, who dissented in

[1] Sykes *v.* Bonner, Cin. Sup. Ct. Rep. 464 (1871).

[2] 41 N. Y. 113; and of Bellinger *v.* Craigue, 31 Barb. 534; Davis *v.* Tallcot, 12 N. Y. 184; White *v.* Merritt, 7 N. Y. 352.

Gates *v.* Preston, that the question of malpractice was not necessarily in issue before the justice. . . . . The merits of this case, under the circumstances, could not necessarily be involved without an issue on the question of negligence; and, so far as the record and the pleadings show, the evidence adduced before the justice was for a different purpose. The effect of that judgment cannot be extended or enlarged by argument or implication to matters, so far as the record shows, which were not actually heard and determined."[1]

But, with all respect, we must doubt the soundness of this position. The ground taken would apply equally to a case of payment. Would the plaintiff have been bound to prove a partial payment for his services? To ask is to answer the question. Could the defendant afterwards sue for the amount of the payment? Clearly not.[2] The truth is, the learned judge misapplies the doctrine that a judgment is conclusive only of matters essential to the decision; it has no application at all to such a case. The rule merely relates to matters which in point of fact were brought in issue; it never arises in cases of judgment by default, or as to matters which were not specifically put in issue either in the pleadings or in the proof. The question always is, in such cases, was the verdict on such and such a point *in actual controversy* an essential element in the determination of the case? The doctrine that a necessary matter of defence, not specifically put in issue, is conclusively determined against the defendant, by a judgment for the plaintiff, does not take its origin from the fact that it was a necessary element in the decision; it is based on the ground entirely that the defendant, having had an opportunity to make defence, voluntarily failed and neglected to do so.[3]

The English courts maintain the same rule as that declared in the case just under consideration, but upon very different grounds.[4] The case first cited was an action for damages for the non-performance and improper performance of certain work; in bar of which the defendant relied upon a judgment in his own favor in an action for the price of the work. In that action, as in

[1] Ihmsen *v.* Ormsby, 32 Penn. St. 198; Mallett *v.* Foxcroft, 1 Story, 474; Spooner *v.* Davis, 7 Pick. 147.

[2] Binck *v.* Wood, 43 Barb. 315; Loring *v.* Mansfield, 17 Mass. 394.

[3] Binck *v.* Wood, 43 Barb. 315.

[4] Davis *v.* Hedges, Law R. 6 Q. B. 687 (1871); Mondel *v.* Steel, 8 Mees. & W. 858.

Sykes *v.* Bonner, *supra*, the defendant had not alleged the improper performance.

The court, Hannen, J., began by quoting the language of Parke, B., in Mondel *v.* Steel, just cited, which was as follows: "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for the breach of warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done as any consequential damage might have been recovered. . . . . But after the case of Basten *v.* Butter,[1] a different practice, which had been partially adopted before, in the case of King *v.* Boston,[2] began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the case, and the work, in consequence of the non-performance of the contract, in the other, were diminished in value. . . . . In all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more."

Mr. Justice Hannen then proceeds to say that the particular point decided in Mondel *v.* Steel was, that one who has fairly obtained an abatement of the price of work done, in an action against him, by reason of a breach of contract in its execution, was not precluded from suing for special damage resulting from the breach of contract. "But," continued the learned justice, "it leaves undecided the question whether he was *bound* to obtain the

[1] 7 East, 479. [2] 7 East, 481, n.

abatement in the action in which he was a defendant, or might recover it in a cross-action. The expression of Parke, B., which was a good deal relied on in the argument, that 'to the extent that he obtains, or is *capable of obtaining*, an abatement of price, he must be considered as having received satisfaction for the breach of contract,' has reference to the facts of the case in which the plaintiff did claim and did obtain an abatement. It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons why he should not.

"It appears from the passages above cited from the judgment in Mondel *v.* Steel, that the present practice of allowing the defence of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle that the statutes of set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralize it, if the defendant was not allowed an option in the matter. The hypothesis is, that the plaintiff for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done; and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which the breach of warranty or breach of contract may afford a defence is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable, therefore, that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases, the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the day of payment has arrived. Surely the right to redress for the diminution of

value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price."

The judge proceeds to mention another inconvenience that would result from a different rule from the one declared; to wit, that it would tend to complicate and increase litigation, from the fact that defective performance of work generally involves consequential and recurring damages by reason of the necessity of repairing the work. And he cited Mondel *v.* Steel as an express authority for a separate action in such case.

The court came to the conclusion also that the better rule was that the defendant had the option to divide the cause of action, and use it in diminution of damages; and that he would then be concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he might, as in the present case, claim no reduction at all, and afterwards sue for his entire cause.

Mr. Justice Lush, who concurred in all except the *dictum* concerning allowing a division of the action, drew the distinction very clearly between the case before the court and the cases of Marriott *v.* Hampton,[1] Hamlet *v.* Richardson,[2] and Brown *v.* McKinally,[3] — cases in which the defendants had been compelled to pay money under judgments, which subsequent evidence, then inaccessible, showed should never have been recovered. "In these cases," said he, "the sole ground of action was the payment; and what the plaintiff sought by the action was to undo that payment [*collaterally*], and to place themselves *in statu quo*. In the present case, the cause of action is the breach of contract; that cause of action existed before and was independent of the payment."

It seems to us that the conclusion at which the court arrived, *as to the case before them*, is inevitable, if the last sentence quoted be correct. If there is a separate and independent cause of action given to each party upon a breach of the contract by the other, neither can be compelled to allege his defence of a breach in a suit by the other. This must be quite clear from the cases already considered. Every cause of action carries with it the right to put it into judgment. That there is a separate and independent cause of action given to each party seems to result necessarily from this fact, that either party may sue the other for a breach. For no suit can be maintained except upon a legal ground of action.

[1] 7 T. R. 269. [2] 9 Bing. 644. [3] 2 Esp. 278.

Now, as one cause of action cannot in itself alone, when merged in judgment, carry another and independent cause of action with it, it seems difficult to escape the conclusion that the employer, for example, may have an action for negligent performance (that is, for a breach of the contract for faithful performance) after judgment by the employee for the full value of services, when the employer pretermits the breach in the first action.[1] It has been in effect adjudged in a well-considered case,[2] that the vendor of

[1] See Nichols *v.* Tremlett, 1 Sprague, 361, 367.

[2] Barker *v.* Cleveland, 19 Mich. 230 (1869). The case was an action by Cleveland against Barker to recover the price of a quantity of cranberries; as a bar to which a verdict and judgment in favor of Barker against Cleveland were pleaded in an action for breach of the contract in respect to the purchase of the cranberries. The court below found that there had been a valid contract of sale; and that the judgment interposed was not a bar.

Chief Justice Cooley, in delivering judgment, opened the subject by saying that whatever fact became the subject of judicial controversy in the suit for the breach of warranty, and was relied on by the plaintiffs therein in support of their action, was necessarily comprehended within the judgment rendered, and was thereby, by legal inference, conclusively settled between the parties to the adjudication. Jennison *v.* W. Springfield, 13 Gray, 544.

"When a party," continued the eminent judge, "declares upon a contract of warranty contained in a sale of chattels, he necessarily affirms the validity of the contract. The warranty does not stand independent of the sale, but is inseparably connected with and forms a part of it. It is only one of the stipulations in the main contract; and it can neither be alleged, or proved, or judicially found, except as a part of the sale. It is evident therefore that the judgment in Wayne County, in affirming the warranty, also affirmed, of necessity, the contract of sale; and that the existence and validity of that contract were therefore necessarily within the issue in that case, and are now *res adjudicata*.

"To constitute the judgment in one case a bar to another action, it is not essential that the object of the two suits should be the same, or that the parties should stand in the same relative position to each other. It would not be claimed by the plaintiffs in error, that because they were plaintiffs in one suit and defendants in the other, therefore their judgment should not conclude them, if the point in controversy were the same in both cases. Nor is it important that in one case it was one stipulation of a contract which was sought to be enforced, while the other suit involved a different stipulation; the validity or invalidity of the contract being adjudged in the one case, it is settled for the other also. Betts *v.* Starr, 5 Conn. 550; Doty *v.* Brown, 4 N. Y. 71; Williams *v.* Fitzhugh, 44 Barb. 321; Walker *v.* Chase, 53 Maine, 258; Sawyer *v.* Woodbury, 7 Gray, 502; Birckhead *v.* Brown, 5 Sandf. 134; Castle *v.* Noyes, 14 N. Y. 329. And it is immaterial whether the point was actually litigated in the first suit or not, if its determination was necessarily included in the judgment. Bellinger *v.* Craigue, 31 Barb. 537.

"As we understand counsel, they claim that the question of the payment of the purchase price was necessarily covered by the issue in their suit upon the warranty; that the court was required to pass upon it in order to determine the amount of damages they had sustained; and that the sum of $ 100 actually found to have been paid was taken into account in the judgment rendered. If the plaintiffs in error are correct in these positions, then, unquestionably, the judgment in the case before us is erroneous.

"We have no doubt that had Barker

goods is not bound to set off their value in an action by the vendee for damages by reason of the failure of the goods to correspond with the warranty; but that the vendor, after judgment in such action in favor of the vendee, may maintain an action on the contract for the price of the goods. The cases seem to be parallel. There can be no better reason why the vendee, the first suit being by the vendor, should be required to allege the inferiority of the goods, than for requiring the vendor to rely upon the contract price in a suit by the vendee. Indeed the excuse for omitting the defence by the vendee is stronger in many cases than

and Bewick proceeded in that case upon the theory of the total rescission of the contract and recovered a judgment, such judgment must have been held conclusive. When a vendee puts an end to the contract of sale, for the failure of the vendor to perform, and brings suit for the recovery of damages, the object of the suit is to place the plaintiff, so far as the law can accomplish that result, *in statu quo*. It is obvious that in such a case the inquiry is of the first importance, how much has been paid on the contract, since such payment constitutes usually the first and leading item of damages. The purpose of such a suit is to recover back the sums which the plaintiff has paid out upon and in consequence of a contract, the benefit of which he has lost through the non-performance by the other party. Freeman *v.* Clute, 8 Barb. 424. The issue therefore necessarily covers, and the trial adjusts, all questions of payment of the purchase price; and the vendor is forever precluded from maintaining a suit for the same or any unpaid portion thereof.

"But we do not understand that an inquiry concerning the amount of damages sustained by a breach of warranty necessarily involves the question of the payment of the purchase price. If the contract is a valid one, it is immaterial to the plaintiff's action, in such a case, whether he bought for cash, or upon a credit not yet expired. The object of the suit is foreign to the question of payment. He sues to recover the difference between the actual value of the articles received on the contract, and what their value would have been had they answered the warranty; and unless the vendor defends on the ground of non-payment of the purchase price, the court does not concern itself with that question. The parties in such a case are at liberty to settle their controversies in one suit or by cross-action; but whether one suit is brought or two, the damages are measured in the same way. If the vendee, instead of bringing a cross-action, sets up the breach of warranty, by way of recoupment, the vendor is entitled to recover the purchase price; while the vendee will have awarded to him, by way of reduction, such damages as he can show he has sustained by a breach of the promise of warranty. Thornton *v.* Thompson, 4 Gratt. 121. . . . . If, however, the vendee thinks proper to bring an independent suit upon the warranty, the damages of the respective parties are not measured by any different standard. If the vendee recovers in that suit, he is conclusively presumed to recover the full difference between the value of the articles delivered, and their value as it would have been had they complied with the warranty. If the only issue in the case is upon the warranty, the court will not concern itself with the inquiry how much of the purchase price has been paid. Perrine *v.* Serrell, 1 Vroom, 458. And the vendee, having recovered his damages in that suit, is supposed to be fully compensated for any deficiency in the articles bought, and to be legally bound afterward to pay any balance of the purchase price, without deduction or controversy."

any which the vendor can present; for, as was suggested in the English case under consideration, it often happens that the vendee is not able at the time of the vendor's suit to ascertain the precise degree of inferiority of the goods. The argument seems to us conclusive against the soundness of the New York cases, unless a distinction can be made between a judgment by confession and one by default or on trial without alleging the defence, which hardly seems possible. In the case of White *v.* Merritt, Mr. Justice Welles seems to have confused the case of an action to recover money paid under a judgment, and that of an action for breach of contract and fraudulent representations. The distinction has already been pointed out between the cases; the former is a direct attempt to impeach a judgment collaterally, while the latter involves a suit on a cause of action separate from and independent of the one merged in the judgment. It is worthy of note also that if Cadaval *v.* Collins[1] be sound law, the plaintiff in White *v.* Merritt might perhaps have directly recovered the money paid under the judgment, as money obtained by fraud.

These remarks have reference merely to the general proposition that the vendee or employer is not estopped by his failure to allege the inferiority of the goods or the negligent performance. We are not so confident of the soundness of the further doctrine, that the vendee or employer may also divide his action, using first the part ascertainable at the time of the plaintiff's action, and subsequently suing for any further damages since ascertained. Indeed, the doctrine seems in direct conflict with the well-settled rule that but one suit can be maintained on one cause of action, and that one judgment merges forever all demands passed upon. The defendant's cross-demand for the plaintiff's breach of contract is single, and not continuous or recurring. The ill performance of the work, or the inferiority of the goods, was but one fact and ground of action, however and whenever it may have manifested itself. If it were otherwise, the demand might be divided when it had not been relied upon in defence, and separate actions might be brought; and this seems sufficient to show the unsoundness of the doctrine.[2]

But a careful distinction must also be noticed between the case where the plaintiff, suing upon several distinct demands, omits to introduce evidence as to some of them, and thus saves the right of

[1] 6 Nev. & M. 324; S. C. 2 Harr. & W. 54.

[2] See *post*, p. 129.

suing again as to such demands, and the case where he fails to produce *sufficient* evidence to sustain his action. In the latter case he will be barred.[1] In the case cited, Chancellor Walworth said that the question, whether a verdict and judgment for the defendant in a former action was a bar to a second suit for the same cause, did not depend upon the fact that the proof in the former suit was sufficient to sustain that action. "For," he continued, "when the same matter was in issue and submitted to the jury in the former suit, without sufficient proof, the decision of the jury upon the matter in issue, and thus submitted to them, followed by the judgment of the court upon their verdict, will be a bar to another action for the same cause or matter, when the same evidence which is necessary to sustain the second suit, if it had been given in the former action, would have authorized a recovery therein. Where a general declaration embraces several causes of action, the plaintiff in a second suit may show that he offered no evidence as to one or more of those causes of action, and that the cause went to the jury upon a different part of his claim from that for which the second suit is brought. And then the judgment in the first action will be no bar to the second. But where he attempts to give evidence as to all the causes of action, and submits the question to the jury without withdrawing any part of his claim, and he fails as to the whole or a part, for want of sufficient proof, the defendant may insist upon the first judgment as a bar, if the same evidence which is sufficient to sustain the second suit would have authorized a recovery in the first action, in case it had been produced upon the trial thereof."[2]

The point is well illustrated by the recent case of the People *v.* Smith.[3] The action in this case was upon a recognizance, which in point of fact had been duly filed in the office of the county clerk. But a former action on the recognizance had been brought, in which the plaintiff had failed to prove the fact of filing, or that it had ever become a record of the court. In that case the court, sitting without a jury, decided that "the recognizance was never filled up, or made a record of any court; that no record of such recognizance had been made in any court; that to maintain an

[1] Miller *v.* Manice, 6 Hill, 114, 121. Per Walworth, Ch.

[2] Stafford *v.* Clark, 1 Car. & P. 403; S. C. 9 J. B. Moore, 724; Ehle *v.* Bingham, 7 Barb. 494; Jones *v.* Weathersbee, 4 Strob. 50.

[3] 51 Barb. 360.

action upon a recognizance, it must appear that it was filed or made a record of in the court in which it is returnable; and that the complaint of the plaintiff be dismissed with costs." It was held that this judgment was conclusive upon the plaintiff in the second action, and that since he could not now recover without establishing the converse of the above findings, his suit must fail.

But the case has been said to be otherwise where there has been a fraudulent concealment of the cause of action by the opposite party.[1] In the case cited, the facts were that an insurance company had taken a bond from their agent for the faithful performance of his duties. Judgment having been recovered upon the bond for money unaccounted for, a *scire facias* was issued, assigning as a further breach that the agent had, before the judgment, received a further sum for which he failed to account, and the receipt of which he fraudulently concealed. Upon demurrer the court held that this concealment justified the company in not presenting the sum in the original proceeding. It would seem, however, that this decision should rest on the ground that the *scire facias* was a mere continuance of the original action, and not an independent collateral proceeding.[2] It is difficult to see how the plaintiff could have a collateral action for a portion of an entire demand, while the remedy of a direct proceeding was at all available. The former course would be unwarranted, because the judgment merged and extinguished the original cause of action. And to allow the action would be to overturn this fundamental principle.[3]

The leading case of Homer *v.* Fish[4] well illustrates the position. The plaintiff there sued to recover insurance money obtained by the defendant upon a judgment against the plaintiff. The declaration alleged that the property insured had perished before the insurance was effected; that the defendant, knowing the facts, fraudulently caused an insurance to be effected with the plaintiffs; that he subsequently proved the loss; and then, in furtherance of their

[1] Johnson *v.* Provincial Ins. Co., 12 Mich. 216.

[2] Eldred *v.* Hazlett, 38 Penn. St. 16.

[3] See *post*, p. 129. The case of Spencer *v.* Vigneaux, 20 Cal. 442, is, however, directly contrary to the view above maintained. It was an action upon a judgment; and two of the defendants were allowed to prove that a large credit had been fraudulently concealed from them at the first trial. No sufficient grounds are stated for the decision; and we are not aware of any upon which it can rest. See also Cadaval *v.* Collins, 6 Nev. & M. 380; S. C. 2 Harr. & W. 54. *Post*, p. 118.

[4] 1 Pick. 435.

conspiracy, instituted suit, and obtained judgment and satisfaction of execution. The defendants pleaded the judgment which they had obtained in bar of the action, alleging that it had not been annulled or reversed. To this the plaintiff replied that he did not know of the fraud until after the time had elapsed within which proceedings could have been had to vacate the judgment; to which the defendant demurred. And the court sustained the demurrer.

Parker, C. J., speaking for the court, said that the only plausible ground upon which the case could be put was that the matter of fraud, the *gravamen* of the action, had not come in question in the trial upon the insurance policy; but he said that the rule would not admit of such an exception. It was sufficient that the action was of a nature to admit of such a defence, and that the plaintiff in the new suit might have availed himself of it in the former action. Where the failure was imputable to laches, there could be no question; and where it was the effect of ignorance of the facts, there must be a period within which the party suffering should be required to present his claim, or great mischief might ensue.

In the case of a writ of entry,[1] it is held that where it appears that a judgment has been rendered against the demandant, he may show that this judgment was rendered on the sole ground that his grantor was disseized at the time of delivering the deed to him, and that he has since fortified his title in this respect; and this though there was another ground of defence, and evidence concerning it produced by both sides.

Mr. Justice Dewey said: "The further fact that another distinct ground of defence was also taken, involving the question of notice of an unrecorded deed, ... and in reference to which evidence was offered, does not make such former judgment a bar to the present action, if it shall appear that the question of notice was not passed upon, or that, if passed upon, it was found that such notice was given, and that the judgment for the tenants was rendered solely upon the ground that the grantor of the demandant was disseized when he executed the deed. In such case, the present demandant may introduce evidence of a newly acquired title by deed duly delivered since the commencement of the former suit, and then proceed to establish title in his grantor."[2]

[1] Perkins *v.* Parker, 10 Allen, 22.

[2] After adding that the court had applied the rule recognized in McDowell *v.* Langden, 3 Gray, 513, the learned judge said:

But suppose evidence upon a certain count was rejected as inadmissible; may a subsequent suit be brought with a proper count? The question was considered in the case of Smith *v.* Whiting.[1] The plaintiff there brought an action for money had and received, and the defendant pleaded a judgment in favor of the plaintiff in a former action between the same parties for the same demand. The plaintiff replied that the count upon which he recovered before was for money laid out and expended, and did not embrace the demand now sued upon; that upon that count he endeavored to introduce in evidence a receipt for the money now claimed, but that the evidence was rejected as inadmissible, upon the count for money laid out and expended, without proof that the sum was paid at the defendant's request; which fact was not in evidence. The replication was demurred to, and the demurrer was sustained.

The chief justice said that it was apparent from the pleadings that this very demand had been tried and determined; and that though the court may have erred in rejecting the evidence offered, this was no way to remedy the case. Exceptions might have been filed, or a new trial had, or a continuance; but as this was not done, and as the plaintiff had permitted a general verdict to go against him, without striking out the count to which the evidence was applicable, the court must presume that the very matter now in dispute had been tried. He said that the cases of Ravee *v.* Farmer,[2] and Golightly *v.* Jellicoe,[3] had established the principle recognized here in Webster *v.* Lee,[4] namely, that where a demand had not been submitted, it should not be barred by an award or report on a rule or submission of all demands. The case of an inquiry of damages went upon the same principles.[5] In all of these cases *no* evidence was offered to support the demands, which were the subject of the second suit; while in the present case the very

"We cannot suppose that any different rule was intended to be sanctioned by the case of Woodbury *v.* Sawyer, 7 Gray, 499. There is nothing contradictory to it in the opinion in that case, upon the exceptions taken at the first trial. The final disposition of it must be assumed to have been intended to be in harmony with the opinion which had been previously announced, and which had recognized the case of Dutton *v.* Woodman, 9 Cush. 255, and McDowell *v.* Langden, *supra*, as authorities." See also Mitchell *v.* Cook, 29 Barb. 243; University *v.* Maultsby, 2 Jones Eq. 241; Woodbridge *v.* Banning, 14 Ohio St. 328; Taylor *v.* McCrackin, 2 Blackf. 261.

[1] 11 Mass. 445.

[2] 4 Term, 146.

[3] Id. in note.

[4] 5 Mass. 334.

[5] Seddon *v.* Tutop, 6 Term, 607.

evidence now relied upon *was* offered, and an adjudication had upon it.

That an action cannot be maintained to recover money paid under a judgment, by reason of the subsequent discovery of evidence showing that the judgment should never have been obtained, was decided as long ago as in 1797, in the well-known case of Marriott *v.* Hampton.[1]

Said Lord Kenyon: "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial, and they are as often refused; but this goes much further."

Though the contrary doctrine of Moses *v.* Macferlan, just cited, has been followed in one or two cases,[2] the rule above stated in Marriott *v.* Hampton is now considered as well settled.[3] But a

[1] 7 T. R. 269, overruling Moses *v.* Macferlan, 2 Burr. 1005 (1760).

[2] Lazell *v.* Miller, 15 Mass. 207; Smith *v.* McCluskey, 45 Barb. 610. The case is not at all like that where the assignee of a mortgage, having sued to foreclose, is defeated by a defect in the assignment, and having subsequently perfected it, brings his action again, which is sustained on a plea of the former judgment. The effect of the judgment in such a case is simply that the plaintiff is not, at the time of the first action, in a position to sue; the suit has been decided on a preliminary point, before the merits of the case were reached. See Mitchell *v.* Cook, 29 Barb. 243; University *v.* Maultsby, 2 Jones Eq. 241; Woodbridge *v.* Banning, 14 Ohio St. 328.

It more nearly resembles the case of a recovery for the full amount of a note, where partial payments have been made, but not indorsed. We have seen that in such case the better opinion is that the defendant cannot afterwards bring an action to recover the amount of the payments, on the ground that he did not appear in defence of the former action. Corey *v.* Gale, 13 Vt. 639; Binck *v.* Wood, 43 Barb. 315. See *ante*, p. 100.

The plaintiff is not estopped in an action for money had and received from collections made by the defendant, by a judgment for the defendant in a former suit upon a special contract to recover the same sum, if the only question submitted in the former action was concerning the special contract. Gage *v.* Holmes, 12 Gray, 428.

In a suit for partition of lands, a legatee is estopped the amounts of advancements and of his distributive share, fixed in a former suit between the parties to determine this very matter. Torrey *v.* Pond, 102 Mass. 355 (1869).

In Wells *v.* Dench, 1 Mass. 232, the defendant in a suit upon a promissory note for $ 100, pleaded a judgment recovered on the note for the sum of dollars and cents; the amount of the damages and costs being left blank. For this cause there was a demurrer to the plea; but the plea was held good.

[3] Kirklan *v.* Brown, 4 Humph. 174; Flint *v.* Bodge, 10 Allen, 128.

distinction has been made in the case of money obtained by extortion, under color of legal process. In such case it has been held that the money may be recovered.[1] The ground of the decision was thus presented by Lord Denman: "Is or is not the money sought to be recovered the money of the plaintiff? It is. How did the defendant obtain the money? By fraud. . . . . This state of things differs the case entirely from those cited.[2] In all the cases cited there was nothing to negative the *bona fides;* and there was the absence of knowledge by the party who received the money, that he had no claim to it."

We are now led to inquire whether judgments are conclusive of anything beyond the point actually determined; i. e. beyond the main question in issue. In Regina *v.* Hartington,[3] two unemancipated children had been removed from the town of L. to that of H. M., upon an adjudication that the father was settled therein. The fact was, however, that the father was settled in H. T. Subsequently the mother was adjudged, as a lunatic, to be settled in H. M. Upon appeal, the question was whether the former judgment was conclusive not only of the point directly decided, but also as to the settlement of the father, and his legal marriage to the mother, so as to give her the same settlement as was adjudged to the children.

The court, Coleridge, J., said: "The matters which are cardinal in the present litigation cannot now be disputed, without asserting that the decision upon them in the former case was erroneous. But this they cannot do directly; they have passed their time, and neglected the lawful mode; they cannot now show, by adducing new evidence, that the court was misled as to the facts, nor by new argument or authority that it drew a wrong conclusion in law. In the case of Regina *v.* Wye,[4] a case sometimes misunderstood, this principle was very clearly affirmed, in accordance with prior decisions. If then the former decision cannot be impeached, and these facts are so cardinal to it that without them it cannot stand, on principle, when these facts are again in question between the same parties, they must be considered as having been conclusively determined.

[1] Cadaval *v.* Collins, 6 Nev. & M. 330; S. C. 2 Harr. & W. 54. But see *ante*, p. 114.

[2] Marriott *v.* Hampton, 7 T. R. 269; Snowdon *v.* Davis, 1 Taunt. 359; Knibbs *v.* Hall, 1 Esp. 84; Brown *v.* M'Kinally, Ib. 279.

[3] 4 El. & B. 780.

[4] 7 Ad. & E. 761.

"Now it cannot be said that the facts we are considering were merely collateral to the decision in the former case. The question then was, where two unemancipated children were settled; and it was answered by showing that they were the legitimate issue of William and Esther, that is, that these two were lawfully married, and the children born after, and that William was settled with the now appellants. Strike either of these facts out, and there is no ground for the decision. These facts therefore were necessarily and directly matter of inquiry. The question now is, where is Esther settled? and this is answered by showing the same two facts, the marriage of Esther and William, and the settlement of William, the two facts already decided."

The court therefore concluded that as the two judgments rested on the same foundation, the matter under consideration was not open to a second litigation. Then after considering and reconciling to this view several cases,[1] cited for the other side, the court referred to others[2] which, they said, had long been considered authorities for showing that orders of removal, unappealed against, or affirmed on appeal, are conclusive evidence, not merely of the fact directly decided, but of those facts also which are mentioned in them and necessary steps to the decision. Unless they were necessary steps, the rule failed, said the court, and they were only collateral facts. In this case, the marriage of Esther and William, and William's settlement, were necessary steps to the former decision; and this fact rendered the adjudication conclusive.

In an action of trespass *quare clausum fregit*,[3] it appeared that the plaintiffs had formerly recovered the *locus in quo* from the defendant, in an action of trespass to try title, and had been put into possession by the sheriff; and that subsequently the defendant reentered, and carried off a crop of corn and fodder which he had planted while in possession. In the present action the defendant justified under a conveyance from the sheriff dated prior to the former recovery, and covering the interest of one of the plaintiffs; contending that the title now set up was not in issue in the former suit, and that that action turned upon a question of location, and the extent of the plaintiff's lines. The court below was of opinion

[1] Rex *v.* Knaptoft, 2 Barn. & C. 883; Regina *v.* Sow, 4 Q. B. 93; Duchess of Kingston's Case, 20 How. St. Tr. 355.

[2] Nympsfield *v.* Woodchester, 2 Strange, 1172; Rex *v.* St. Mary Lambeth, 6 Term, 615; Rex *v.* Rudgeley, 8 Term, 620; Rex *v.* Catterall, 6 Maule & S. 83.

[3] Caston *v.* Perry, 1 Bailey, 533.

that the recovery concluded the defendant only as to any title adverse to that of the plaintiffs, and did not preclude his showing that he was tenant in common with them. But this doctrine was overruled on appeal.

Mr. Justice Calcock said that it was true that to make the record evidence on a particular point, it must appear that that point was in issue; but the former suit was brought to try the title to the identical spot of land upon which the defendant had again trespassed. The defendant had at that time the very title on which he now relies; and whether the suit turned upon the extent of the lines, or the title itself, was wholly immaterial. If one, having a dozen titles, could set them up in succession, the plaintiff might be kept in court all his life. If the defendant had a title by which he could claim to be a co-tenant with the plaintiffs, he should have produced it.

In the case of Perkins *v.* Walker,[1] the plaintiff brought an action of slander. The defendant gave evidence tending to prove the truth of the words spoken. The plaintiff then produced the record of a judgment in his favor, in an action of trover, brought by the defendant against him to recover for the alleged taking and conversion of certain cloth; and it was admitted that the cloth sued for in that action was the same cloth in reference to which the words charged as slanderous were spoken by the defendant. The court held that the judgment was conclusive against the defendant both as to the title to the cloth, and as to the defence alleged in justification to this action.

In an action of trespass for mesne profits,[2] the plaintiff gave in evidence the record of a judgment against the defendant, in an ejectment begun in 1843. The defendant showed an ejectment against the vendor of the plaintiff, begun in 1841, and a judgment followed by a *habere facias possessionem*, executed. The court below held the defence good; but a contrary decision was given on appeal.

Mr. Justice Kennedy said that it had ever been held in an action of trespass, brought for the mesne profits of premises previously recovered of the defendant, in ejectment, that the judgment in ejectment was conclusive evidence of the plaintiff's title to the possession and right to receive the mesne profits from the date of the demise in the declaration.[3] And no defence could be alleged

[1] 19 Vt. 144.

[2] Man *v.* Drexel, 2 Barr, 202.

[3] Aslin *v.* Parkin, 2 Burr. 668; Van Alen *v.* Rogers, 1 Johns. Cas. 281; Ben-

against the action for mesne profits which would have been a bar to the action of ejectment.

But where the title relied upon has been acquired subsequently to the former action, the former judgment is no bar; for there could then have been no adjudication of the matter.[1]

In the case of an action for assault and battery,[2] it appeared that the injury was committed on a piece of land claimed by both parties. The plaintiff, to prove that he was in lawful possession of the land, offered in evidence the record of a judgment in his favor, in an action of forcible entry and detainer by himself against the defendant, for the recovery of the same piece of land. The injury for which he then recovered was identical in point of time, as well as place, with the assault in question. And the judgment was held conclusive.

Closely connected with the point considered in the last class of cases follow another class in which the former adjudication fell upon some preliminary matter, before the merits of the case were reached or determined. In such case the plea of former judgment is no bar. The cases to be presented will fully illustrate the doctrine.

In Kendal *v.* Talbot,[3] the defendants to an action of covenant pleaded in bar a former judgment, rendered in the same court in their favor, in an action brought against them by the plaintiff upon the same covenant. Upon oyer it appeared that the judgment pleaded was rendered on the ground of the insufficiency of the plaintiff's declaration. The court held that such a judgment could not be a bar.[4] And the same is true of the dismissal of a bill in chancery for insufficiency.[5]

A decision upon a demurrer which has, however, clearly gone to the merits of the case, is an effectual bar to further litigation.[6] But where the demurrer presented two objections, and was sus-

son *v.* Matsdorf, 2 Johns. 369; Jackson *v.* Randall, 11 Johns. 405. In some of the States the action of ejectment is considered as more than a mere possessory action, and is conclusive of title. See Payne *v.* Payne, 29 Vt. 172.

[1] McKissick *v.* McKissick, 6 Humph. 75.

[2] Bell *v.* Raymond, 18 Conn. 91.

[3] 1 A. K. Marsh. 321.

[4] See also Thomas *v.* Hite, 5 B. Mon. 590; Birch *v.* Funk, 2 Met. (Ky.) 544; Stevens *v.* Dunbar, 1 Blackf. 56.

[5] Thomas *v.* Hite, 5 B. Mon. 590.

[6] Gray *v.* Gray, 34 Ga. 499; Wilson *v.* Ray, 24 Ind. 156; Estep *v.* Larsh, 21 Ind. 190; Robinson *v.* Howard, 5 Cal. 428; City Bank of New Orleans *v.* Welden, 1 La. An. 46; Keater *v.* Hock, 16 Iowa, 23; Coffin *v.* Knott, 2 G. Greene, 582; Perkins *v.* Moore, 16 Ala. 17.

tained generally, one of the grounds being a preliminary defect, and the other going to the merits of the case, it is said that it will be presumed that the decision rested upon the former ground.[1]

In the case of an action for damages for failure to perform a contract,[2] declared upon in several counts, some for negligence, some for false warranty, and one in trover, it was strenuously argued, in a subsequent suit on the contract, that by judgment for the plaintiff, in a small sum, upon a demurrer to the declaration, it had been conclusively determined that the contract had been performed, except so far as the judgment for the small sum indicated the contrary. But the court ruled otherwise.

"Did that demurrer prove," said Mr. Justice Ellsworth, "that the facts contained in the declaration were not true? and it must be this to help the plaintiff. It rather proved the contrary, if it proved anything; and for the purposes of that case, it certainly did prove the contrary. How then did it prove full performance by the plaintiff, which was flatly denied in the declaration? The whole effect of the judgment on a demurrer, and the $100 damages, is that on that declaration, on some of the counts, the defendant had subjected himself to pay $100 for not performing his contract, or for his fraudulent warranty, or his conversion of the plaintiff's goods. The admission by the demurrer is rather that the common carriers did nothing, than that they performed anything, much less that they had done everything, except to the amount of $100, which damages might have been given and probably were given for the carriers destroying a portion of the shippers' lumber in the port of New York; and so that record furnished no evidence at all of the performance of the voyage, ... any more than a record of a recovery by a proprietor, who has sued his contractor for stealing and wasting the timber he furnished him to build the proprietor's house, and a recovery for the value of the lumber destroyed, proves that the house was built, in time and manner as agreed; and there being other counts for not performing in due time and in proper manner makes no difference, for an admission even of the whole cause of action in such count has no tendency to prove performance by the builder."

The case of Borrowscale *v.* Tuttle [3] involved the effect of the dismissal of a bill in chancery. The suit was to redeem a parcel of

[1] Griffin *v.* Seymour, 15 Iowa, 30.
[2] Chapin *v.* Curtis, 23 Conn. 388.
[3] 5 Allen, 377.

land from mortgage. The defence was this: The plaintiff's grantor of the equity of redemption had brought a suit in chancery against the same defendant, who appeared and answered under oath. Subsequently, on motion of the plaintiff in that cause, and without the defendant's knowledge, the bill was dismissed, and judgment given for the defendants for costs. The time had expired within which the plaintiff might have filed a replication and taken testimony. The court held the defence perfect. It was a judgment, they said, which, as had been settled in Foote *v.* Gibbs,[1] was conclusively presumed to have been upon the merits, and was a final determination of the controversy.

The question of the effect of a judgment of *non-pros.* as to part of the cause of action arose in Howes *v.* Austin,[2] in a subsequent suit upon the matter *non-prosed.* As stated in the opinion of the court, the plaintiff, in the former action, had been called and defaulted, for want of a replication to the defendant's plea to the first and second count of the declaration. The plaintiff had failed to reply within the time required by a rule of court; and a judgment was entered for the defendants, as to those counts, that he go hence without day. The defendant contended that this judgment barred any subsequent action upon the demand stated in those counts. But the court decided that, though it might be final for costs,[3] its effect in the present case was simply to turn the plaintiff out of court on the cause of action *non-prosed;* leaving him at liberty to proceed for the recovery precisely as though the counts *non-prosed* had never been filed.[4]

The effect of a nonsuit on motion of the defendant came directly before the Supreme Court of the United States in Homer *v.* Brown.[5] Wayne, J., in delivering judgment, said: "A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *non-prosed*, and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error as to the subject-matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not.

[1] 1 Gray, 412.
[2] 35 Ill. 396.
[3] 2 Archbold, Practice, 229.
[4] See also 3 Black. Com. 296.
[5] 16 How. 354.

"It is not, however, only for a non-appearance, or for delays or defaults, that a nonsuit may be entered. The plaintiff in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury with the view to submit the law of the case to the court upon an agreed statement of facts, with an agreement that the plaintiff shall be *non-prosed* if the facts stated are insufficient to maintain the right which he claims. The court in such case will order a nonsuit, if it shall think the law of it against the plaintiff; but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same, and no more, than if he had been *non-prosed* for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent.[1] The Supreme Court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties; but its judgment cannot be pleaded as a bar to the suit, though in giving it an opinion was expressed upon the merits of the demandant's claim."[2]

[1] Ensign *v.* Bartholomew, 1 Met. 274. But see Jarboe *v.* Smith, 10 B. Mon. 257.

[2] "Judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter." Per Clifford, J., in Derby *v.* Jacques, 1 Cliff. 425, 432; citing Homer *v.* Brown, *supra;* Morgan *v.* Bliss, 2 Mass. 111; Knox *v.* Waldoborough, 5 Greenl. 185; Bridge *v.* Sumner, 1 Pick. 371; Wade *v.* Howard, 8 Pick. 353. See also Coit *v.* Beard, 33 Barb. 357; Dexter *v.* Clark, 35 Barb. 271; Jones *v.* Underwood, Ib. 211; Jay *v.* Carthage, 48 Maine, 353.

A voluntary nonsuit taken by the plaintiff, any time before judgment, of course will not estop him to bring a new action; and this though the judgment had been reversed and the cause remanded before he dismissed his suit. Holland *v.* Hatch, 15 Ohio St. 464.

The effect of a *nolle prosequi* is the same; it is not a bar to another indictment for the same offence, even if it precludes the government from suing out new process requiring the party to answer the same indictment, which is more doubtful. Bacon *v.* Towne, 4 Cush. 234, per Shaw, C. J.; Commonwealth *v.* Wheeler, 2 Mass. 172.

If the parties to a cause agree to await the result of another trial, it is said they will be estopped by the judgment in that case, even though it was one of nonsuit. Brown *v.* Sprague, 5 Denio, 545.

Among the many other illustrations of the doctrine that a judgment is no bar to a new suit upon the same demand, unless there was a trial on the merits, the following may be mentioned: In McFarlane *v.* Cushman, 21 Wis. 401, the fact that the plaintiff, obligee in a bond sued on, had previously brought suit upon the same bond, before its maturity, was decided to be no bar to the present action, instituted after the bond had become due. To the same effect, Gray *v.* Dougherty, 25 Cal. 266; Quackenbush *v.* Ehle, 5 Barb. 469.

In Wheeler *v.* Ruckman, 7 Rob. 447, it was determined that a judgment of dismis-

Our next inquiry is, whether the form of the two actions, as well as the cause, or point decided, must be the same, in order that a former judgment or verdict may be pleaded in bar.

In Slade's Case,[1] though this precise question was not in issue, it was resolved by all the justices and barons of England, "after many conferences," in the language of Lord Coke, that the plaintiff in that action on the case, in *assumpsit*, should recover not only damages for the special loss which he might have sustained, but also for the whole debt, "so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt is a good bar in an action on the case, on *assumpsit*."

sal for want of parties was no bar to a subsequent suit for the same demand.

In Durant v. Essex Company, 7 Wall. 107, the court say, in reference to a decree in equity: "Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits." Walden v. Bodley, 14 Peters, 156; Hughes v. United States, 4 Wall. 237; Bigelow v. Winsor, 1 Gray, 301; Foote v. Gibbs, Ib. 412. It is held in Bostwick v. Abbott, 40 Barb. 331, that after a case at law has been decided against the plaintiff on the merits, the court has no power to destroy its effect by amending it so as to give permission to the plaintiff to bring another suit. But see Borden Mining Co. v. Barry, 17 Md. 419.

When the record of a suit showed that by the plaintiff's failing to appear to his action his writ was "abated and dismissed," and judgment given for the defendant for $5 and costs, this was held no bar to a new suit. Haws v. Tiernan, 53 Penn. St. 192.

So where judgment has been rendered solely for informality in a replevin bond, a new action may be brought. Walbridge v. Shaw, 7 Cush. 560; Morton v. Sweetser, 12 Allen, 134.

So of a cause tried upon the merits, but eventually dismissed for want of jurisdiction. Waddle v. Ishe, 12 Ala. 308.

But it is said there is no doubt that a judgment on *retraxit*, being an admission of record by the plaintiff that he has no cause of action, is as perfect a bar as a judgment after verdict. Coffman v. Brown, 7 Smedes & M. 125. In this case the court held that the following plea did not constitute a *retraxit*: "That a suit had been previously brought for the same cause of action, between the same parties, in which the plaintiff, in his own proper person, came into court, and confessed that he would not further prosecute his said suit against the said defendant, but from the same altogether withdrew himself; whereupon it was considered by the court that the plaintiff should take nothing, and that defendant go without day." See Minor v. Mechanics' Bank, 1 Peters, 74.

The assignee of a mortgage having sued to foreclose the same, judgment was given against him for a defect in the assignment; and it was decided that this was no bar to a subsequent suit brought after the assignment had been perfected. Mitchell v. Cook, 29 Barb. 243.

And a decree fixing the fact that the plaintiff had no title at the time of a former suit is no bar to a suit after having acquired the proper titles. University v. Maultsby, 2 Jones Eq. 241; Woodbridge v. Banning, 14 Ohio St. 328; Taylor v. McCrackin, 2 Blackf. 261; Perkins v. Parker, 10 Allen, 22.

[1] 4 Coke, 92 *b*, 94 *b*.

A judgment in trover for the *defendant* is no bar to an action for money had and received by the defendant for the plaintiff's use, in respect to the same matter for which the action of trover was brought.[1] And this shows that the form of action may in some instances be changed where the cause of action remains substantially the same, without the fear of a plea in bar. And the circumstances under which this may be done would seem to be, where it cannot be certainly known that the verdict and judgment in the former and different form of action were based upon matters which would negative those alleged in the subsequent suit. But the mere change of the form of action, where it is certain that the former judgment negatives the claim or matter alleged, will have no effect, and a plea of the former trial will be an absolute bar;[2] otherwise the doctrine of *res judicata* would be a mere delusion.

It is in accordance with the principle in the foregoing cases that, where a party has presented a claim before a court of justice, and judgment has been pronounced against its validity, he cannot escape the effect of the adjudication by filing the same matter in set-off in a subsequent action against him by the defendant.[3]

Nor will it change the effect of the former judgment that another matter has been added to the ground of complaint, if the original ground is presented also.[4] In the case cited, a former suit for judicial separation had been dismissed, in which the ground of complaint alleged was cruelty. In order to avoid the effect of the decree, the petitioner now added a charge of adultery to that of cruelty, and prayed for a dissolution of the bonds of matrimony. But the court held the former decree a bar as to the charge of cruelty. And this seems to be in accordance also with a principle already considered, that a matter once adjudicated cannot be again disputed by the parties, whether in the same or a different cause of action.

It is a general principle, too, that a party or privy cannot re-litigate a matter adjudicated in a court of law, in a collateral action in chancery. The point has been frequently so decided.[5] The case first cited was this, in brief: The defendant's testator had

[1] Hitchin *v.* Campbell, 3 Wils. 240; Buckland *v.* Johnson, 15 Com. B. 145; S. C. 26 Eng. L. & E. 328.

[2] Routledge *v.* Hislop, 2 El. & E. 549.

[3] Jones *v.* Richardson, 5 Met. 247.

[4] Finney *v.* Finney, Law R. 1 P. & D. 483 (1868).

[5] Hendrickson *v.* Norcross, 4 C. E. Green, (N. J.) 417; Baldwin *v.* McCrea, 38 Ga. 650.

bought land, at sheriff's sale, under an execution at law against the complainant's grantor. Subsequently to the levy on the land, the defendant in the original suit at law had conveyed it to the complainant. The executors of the purchaser at the execution sale being about to dispose of the land, the complainant sought to restrain the sale in chancery, and compel the executors to convey the land to him; the ground being that the levy on the land and the sale were unauthorized. But the suit was dismissed.

The court said it was possible that the plaintiffs in the suit at law were not entitled to a levy on the land; but the defendant, the complainant's grantor, was duly served with notice in that action, and having allowed judgment to go against the land, he could not now disturb the sale in this collateral way in chancery.

But where a prior action had been brought at law by the party holding the legal title to real estate, to recover possession, and the defendant sought to impeach the patent under which the plaintiff claimed, and judgment went against the defendant, on the ground that his defence was equitable, and could not be considered in that action; and the defendant thereupon brought his action in chancery to have the patent set aside, the court held the suit maintainable.[1] But this, it will be at once perceived, was on the ground that there had been no adjudication in the suit at law as to the validity of the patent.

So where evidence of a set-off is excluded in a suit at law, and judgment given for the plaintiff, this is not an adjudication of the matter of set-off, so as to prevent the party from enforcing it in chancery; though it would be otherwise if the law court had actually passed upon the merits of the set-off.[2]

The effect of judgments upon cumulative remedies was considered in Butler *v.* Miller.[3] That was an action of trover for property conveyed to the plaintiffs by chattel mortgage. The defence was a judgment confessed by the mortgagor to the mortgagee for the debt secured by the chattel mortgage. But it appeared in evidence that it had been agreed that the judgment should be taken as collateral to the mortgage. The court below held that if it was satisfactorily shown that the judgment was taken as collateral to the mortgage, there was no merger of the plaintiff's right of action on the latter.

[1] Arnold *v.* Grimes, 2 Iowa, 1.
[2] Hobbs *v.* Duff, 23 Cal. 596.
[3] 1 Comst. 496; S. C. 1 Denio, 407.

On appeal this ruling was affirmed; but Mr. Justice Johnson, in speaking for the court, thought that there would have been no merger even without the agreement mentioned. It would scarcely be contended, he said, that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished the mortgage. And a mortgage upon real estate was only a security and an incumbrance upon the land; whereas a mortgage of personal property was more than a security. It was a sale of the thing mortgaged, and operated as a transfer of the whole legal title to the mortgagee, subject only to be defeated by a performance of the condition. If then a judgment upon the original debt would not extinguish a collateral security for its payment upon real estate, he could not see how it could divest a title to personal property acquired by purchase.

Although it was clear, he continued, that the notes were merged in the judgment, it did not follow that all collateral remedies were extinguished. The debt was not yet satisfied; and until that was done, he thought that all collateral remedies remained. The rule that a security of a higher nature extinguished inferior securities would be found to apply only to the state of the debt itself, and meant no more than this, that when an account was settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition was extinguished or swallowed up in the higher security; and that all the memoranda by which such inferior condition was evidenced lost their vitality. It had never been applied, he said, and never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These were only to be cancelled by satisfaction or voluntary surrender.[1]

In Storer *v.* Storer,[2] the plaintiff, as administrator *de bonis non*, sued the defendants in debt as administrators of the person to whom the plaintiff had succeeded in administration. The defendants pleaded in bar a decree of the court of probate on their administration bond, giving the plaintiff judgment for the very demand now sued for; but as to which no execution had issued. But the court held the action proper; the ground being that the two remedies were merely cumulative. A judgment in a suit where the action is given as a remedy merely cumulative was no bar, it was said, without satisfaction.

[1] See also Butler *v.* Miller, 5 Denio, 159. [2] 6 Mass. 390.

The case of Drake *v.* Mitchell[1] involved this question. The action arose in this way: Three joint covenantors were sued for the rent of certain premises; and among other things they pleaded that one of their number had given his promissory note and bill of exchange in part satisfaction of the rent, and that this, not having been paid at maturity, was sued upon by the plaintiff, and judgment obtained against the maker. The plea alleged that the note had been given for the payment and in satisfaction of the debt, but did not aver that it had been so accepted; nor did it allege that the note had produced a satisfaction in point of fact. The plaintiff demurred to the plea; and the demurrer was sustained.

Lord Ellenborough said: "I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered, operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have. If indeed one who is indebted upon simple contract give a bond or have judgment against him upon it, the simple contract is merged in the higher security. So one may agree to accept of a different security in satisfaction of his debt; but it is not stated here that the note and bill were accepted in satisfaction, and in themselves they cannot operate as such until the party has received the fruits of them. And then, although they were not originally given in satisfaction of the higher demand, yet, ultimately producing satisfaction, it would be a bar to so much of the demand."

Le Blanc, J., said: "The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment."

Lawrence, J.: "The judgment recovered on the bill is in itself no satisfaction until payment be obtained upon it."

The law will not permit a party who has recovered in one action a portion of an entire demand, to make the residue of it the subject of another suit.[2] In Bancroft *v.* Winspear it is held that this

[1] 3 East, 251.

[2] Bancroft *v.* Winspear, 44 Barb. 209; Guernsey *v.* Carver, 8 Wend. 492; Bendernagle *v.* Cocks, 19 Wend. 207; Fish *v.*

is true even where the demands sued upon are different, if they are both created by the same indivisible cause. This subject is considered with force and ability by Mr. Justice Dewey, in delivering the opinion of the court in Goodrich *v.* Yale;[1] and the importance of the subject will justify a quotation at large from the opinion. "In what cases," he says, "a former judgment in a suit between the same parties shall operate as a bar to further litigation by a new action, is a question of much nicety. The difficulty arises, not so much for want of certain general rules upon the subject, as from the doubt as to which class of cases the one which is the subject of inquiry belongs.

"A suit and judgment thereon for the same cause of action are said to be absolutely conclusive, as a bar to a second action. But it is equally true that the mere fact that the plaintiff has in his former action declared for the same causes of action does not necessarily present a case where the judgment in such action shall be a bar to a subsequent suit for one of the causes set forth in the former. Thus in Seddon *v.* Tutop,[2] where the plaintiff in the former action had in different counts declared on a promissory note, and for goods sold, and the defendant being defaulted, the plaintiff, upon executing his writ of inquiry, gave no evidence on the count for goods sold, and took his damages for the promissory note only, it was held that the judgment was no bar to his recovering in a subsequent action for the goods sold. But in that case there were two distinct demands set forth in distinct counts, and not in the least blended together. It is also true, as held in the case of White *v.* Moseley,[3] that where there are distinct torts, committed consecutively, but on different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts,

Folley, 6 Hill, 54; Marble *v.* Keyes, 9 Gray, 221; Stein *v.* Prairie Rose, 17 Ohio St. 471; Erwin *v.* Lynn, 16 Ohio St. 539.

It is said this is not true in the case of contracts for services where the employer prevents performance; the injured party being permitted to sue for his wages as they become due, from time to time, in separate actions. Thompson *v.* Wood, 1 Hilt. 93. But this cannot be the law. See Goodman *v.* Pocock, 15 Q. B. 576; Planchè *v.* Colburn, 8 Bing. 14; Derby *v.* Johnson, 21 Vt. 17; Moulton *v.* Trask, 9 Met. 577; Wilhelm *v.* Caul, 2 Watts & S. 26. A party, it is also said, may make a voluntary compromise or satisfaction of his claim in the course of an action embracing only part of an entire demand, without merging the whole. O'Beirne *v.* Lloyd, 43 N. Y. 248 (1870).

[1] 8 Allen, 454.

[2] 6 Term, 607.

[3] 8 Pick. 356.

yet constitutes no bar to a second action for the other act. On the other hand, the case of Trask *v.* Hartford and New Haven Railroad[1] strongly asserts and applies the principle that a judgment in a civil suit, upon a certain alleged cause of action, is conclusive upon the parties in relation to it, and that another suit for the same cause cannot be maintained for any purpose whatever. In that case the subjects of damages in the different actions were wholly distinct; the one being the loss of a shop, and the second the loss of a dwelling-house. No damages had been claimed or recovered in the first action for the loss of the house; but the loss of each was caused by the same tortious act, and one recovery for any part of the damages caused by such act was held a bar to a second action. It was said by the court in that case: 'It would be unjust, as well as in violation of the fixed rule of law, to allow the plaintiff to subject the defendants to the hazard and expense of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof.'

"The inquiry is, under which, if either, of these classes does the present case fall? It certainly differs from the case of Seddon *v.* Tutop,[2] in the fact that there the causes of action were on the face of them distinct and independent, and were sought to be enforced as such by separate counts. That case only shows that a party may omit to assess his damages on one of several distinct counts for acknowledged distinct causes of action; and if he does so, a judgment for damages upon the other causes of action will not bar a second suit for the causes of action for which no damages were assessed. . . . .

"The case before us differs from White *v.* Moseley,[3] in the fact that there the particular tort, the subject of the second action, was not embraced in the declaration, or set forth as the cause of complaint in the first action. It differs also in the fact that there the torts were committed on different localities, the one on the premises of the plaintiff, and the other not. That case came before the court under very peculiar circumstances. The plaintiff had, in the trial of his former suit, insisted upon his right to recover damages for the cause of action set up in the second suit; but the defendant opposing it upon the ground that the alleged trespass *quare clausum* did not embrace the close where the second injury was done, the

[1] 2 Allen, 331. [2] 6 Term, 607. [3] 8 Pick. 356.

court ruled that the evidence to support this claim of the plaintiff was not admissible, it being a distinct cause of action.[1] In the trial of the second action, the ruling maintaining it was based entirely upon the assumption that the acts of the defendants were separate torts, and therefore constituted more than one cause of action. The inquiry therefore will be, whether the present case, differing as it does from Seddon *v.* Tutop in having only a single count, charging combinedly a tort by raising and then shutting down the gate of the plaintiffs, instead of two distinct counts for separate causes of action, comes within the principle there decided. The like inquiry will also arise as to the effect of the difference in the circumstances we have alluded to, in the case of White *v.* Moseley, in distinguishing that case from this.

"If this shall be taken to have been but one cause of action, although damages might probably have been assessed for various distinct acts, then the case we have cited of Trask *v.* Hartford and New Haven Railroad, which is abundantly sustained by other authorities, would be decisive upon the point that the former judgment is a bar to this action.

"The case is barren of all evidence as to the nature of the grievance complained of, except as shown by the record of the proceedings in the two actions. We turn, therefore, to the declaration in the first action. We find there that the tort complained of was, that on divers days the defendant entered upon the real estate of the plaintiffs, without right, and raised the gates of their dam, and caused the water to flow down and waste their reservoir, and at times to flood their mill, and then, by shutting the gate, took away the water from their mill. Here the acts causing the damages are stated as a series of connected acts, occurring while the defendant was a trespasser, by entering without right upon the real estate of the plaintiffs, and the answers of the defendant so treated the same, denying the allegation that he had entered upon the plaintiffs' real estate without right, and denying all the acts alleged as wrongs connected with the trespass.

"Upon the issues thus joined, that case, as appeared by the copy of the record, was referred to the assessors, 'to assess the damages occasioned to the plaintiffs by the raising of the gate in the reservoir dam, and make report thereof to the court.' They did subsequently report that the damages sustained by the plaintiffs in

[1] White *v.* Moseley, 5 Pick. 230.

this case amounted to the sum of $125, and judgment was thereupon entered for that sum. It is now said that this judgment is not a bar to the present action, because the court did not submit to the assessors this specific ground of damage, and did not direct them to assess damages for shutting down the plaintiffs' gate. This is true; but it is equally true that they did not direct the assessors to assess damages for causing the water to flow down and waste their reservoir, and at times flood their mill, all of which were alleged as injuries. The order seems to have first declared a reference of the case. Then follows an imperfect description of the alleged causes of damages.

"There is no apparent reason for naming one portion of the case rather than another as the subject for the assessment of damages. It was certainly not a full recital of the plaintiffs' alleged grievances. But if it were to be taken that the assessors only reported upon one of the alleged facts, it is quite clear that it was open to the plaintiffs to ask for a recommittal for that cause, and under an enlarged rule. But the plaintiffs were content to take these damages as the damages for the entire trespasses that were set forth in their declaration.

"But however this may be, we are of opinion that the judgment in the former action must be a bar to the present one, inasmuch as the cause of action, as presented by the plaintiffs on the record, is one and the same. The grievance complained of was an illegal entry upon the plaintiffs' land, and by various acts . . . . rendering their mill valueless. The particular acts causing the damage to the mill are not set forth, as connected with a separate entry, but as a series of acts, all of which are combined as causing the injury to the mill. It is true that the declaration does not restrict them to the proof of a single entry; but it does connect all these acts with each and every entry. It fails to state them as separate causes of action, or to allege them to have occurred at different times."

An action was brought[1] for failing to accept a residue of certain goods under an entire contract; and the defence was that the plaintiff had brought an action for the other portion of the goods, and recovered judgment, and received full satisfaction. This was held a good defence; the ground being that as the contract was entire, the plaintiff could not separate it into parts, and bring an action for one part at one time, and for another at another time.[2]

[1] Carvill *v.* Garrigues, 5 Barr, 152.

[2] Smith *v.* Jones, 15 Johns. 229; Farrington *v.* Payne, Ib. 431.

In an action of trespass in the case[1] to recover for loss of services sustained subsequently to February 28, 1840, in consequence of injuries to the plaintiff's son by the breaking of a bridge, the defence was that the plaintiff had obtained a judgment for similar damages sustained *prior* to the date mentioned, by reason of the same injury. And the court held that the judgment was a bar to the present action.

The ground taken by the majority was that the injury inflicted by the fall of the bridge was one and entire, though there might be a continuation of the damages; and that the plaintiff might have recovered prospective damages in the former suit.[2] Several important cases were considered and distinguished;[3] and one case was admitted to bear against the doctrine.[4] In concluding, they said that to maintain a second suit for a fresh damage, in a case in which there was no new injury, would be novel in principle and not warranted by authority.

The chief justice, dissenting, denied the doctrine of prospective damages where they were uncertain, and thought they could only be recovered to the commencement of the writ, but that they might be the subject of another action when they accrued.

To an action of trespass[5] for illegal imprisonment, the defendant pleaded a recovery before a justice of the peace for the same trespass. The plaintiff replied, assigning other trespasses; to which the defendant rejoined, not guilty; and issue was joined thereon. In respect to the matter of former recovery, that was for an imprisonment on the 3d of December, the original writ being dated December 5th; but the imprisonment newly assigned was from the 6th of the same month to the 10th of the next. It was a continuing imprisonment from the 30th of December; and the defendant insisted that the whole constituted but one injury, for which the plaintiff had already recovered. But the defence was overruled.

The court said that the imprisonment was the gist of the action, and that every continuation of it was a new trespass; so that the plaintiff might well have brought his action for an assault com-

[1] Whitney *v.* Clarendon, 18 Vt. 252.

[2] Hodsoll *v.* Strallebrasse, 11 Ad. & E. 301.

[3] Hambleton *v.* Veere, 2 Saund. 169; Ward *v.* Rich, 1 Ventr. 103; Brasfield *v.* Lee, 1 Ld. Raym. 329; Roberts *v.* Read, 16 East, 215.

[4] Malachy *v.* Soper, 3 Bing. N. C. 371; S. C. 3 Scott, 723.

[5] Leland *v.* Marsh, 16 Mass. 389.

mitted on the day after the date of his former writ; and if so, he might well assign that anew.

But the plaintiff in a judgment by default cannot prevent the defendant from bringing suit by allowing him a partial credit for a separate claim.[1] In the case cited, the plaintiff sued in *assumpsit* for goods sold and delivered; and the defence was that the goods in question had been credited by the present defendant in an account annexed to a writ sued by him against the present plaintiff, before the commencement of this action, in which former suit judgment had been rendered by default. The plaintiff desired to prove, in the court below, that the amount thus credited was not equal to the value of the goods; but the court refused to hear the evidence, on the ground that the former judgment was conclusive of the value of the goods. The case was appealed, and the judgment reversed.

Mr. Justice Wilde, referring to the argument that the evidence offered would tend to impeach the former judgment, said that if this were true, it would clearly be inadmissible; but he said that the maxim *Judicium semper pro veritate accipitur* applied only to matters directly adjudicated, not to matters arising incidentally. The defendant in the former suit was not bound to avail himself of the plaintiff's admission or confession of payment. He was not bound to prove the value of the goods at his own expense, when by bringing suit for them the expense would be thrown upon the opposite party. Such a rule as the present defendant contends for, he said, would be often productive of injustice. He then added this illustration: "Suppose a case of mutual demands between A and B; A's demand against B being $20, and B's demand against A $30. If A sues B, and credits B's demand of $30 at only $15, how, upon the principles advanced by the defendant's counsel, can B recover his balance of A? He can recover no balance in A's suit; and if judgment in that suit is conclusive, he can have no remedy." And he added that though the party might file his account, and claim a set-off, still the statute did not compel him to do so.

4. *Collateral Impeachment of Judgments.*

Having completed the consideration of the first three divisions of domestic judgment, we come now to the fourth, in which it is

[1] Minor v. Walter, 17 Mass. 237.

intended to show under what circumstances and in what particulars a domestic judgment is liable to impeachment in a collateral action. We have already seen that strangers may impeach judgments in collateral actions; we are now to ascertain if parties, or those who might have been parties, ever have the like privilege. And first, of contesting the jurisdiction.

In the case of domestic judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court in which the former judgment was recovered, unless it appear from the face of the record that the court had not acquired jurisdiction.[1] We shall see in the following chapter that the rule is different respecting foreign judgments. Just what it means when applied to domestic judgments, we shall now endeavor to show.

One of the most thoroughly considered cases upon this subject is that of Hahn *v.* Kelly, first above cited. In that case the record of the former judgment recited "that the summons and complaint in this case have been duly served on the defendants according to law and the order of the judge of this court." It was a case of publication under the statute, and service without the jurisdiction of the court, which matters also appeared in the record; and it was claimed that the court must presume a legal service, notwithstanding the fact that the proof failed to show it, or tended to show the contrary; in other words, that though the affidavits as to publication and service failed to state all the facts which were made essential by the statute to that mode of proceeding, the court must presume that some other affidavit was actually made, in view of which the court entertained jurisdiction, and which for some reason had not been made part of the judgment roll by the clerk.

Mr. Justice Sanderson, speaking for the court, said: "Within certain limits, this is undoubtedly true; but thus broadly stated

[1] Hahn *v.* Kelly, 34 Cal. 391; Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Washington Ins. Co., 35 N. H. 162; Penobscot Railroad Co. *v.* Weeks, 52 Maine, 456; Mercier *v.* Chace, 9 Allen, 242; Wiley *v.* Pratt, 23 Ind. 628; Coit *v.* Haven, 30 Conn. 190, and cases cited; Pardon *v.* Dwire, 23 Ill. 572; Wingate *v.* Haywood, 40 N. H. 437; Clark *v.* Bryan, 16 Md. 171; Callen *v.* Ellison, 13 Ohio St. 446; Kennedy *v.* Georgia State Bank, 8 How. 586; McCormick *v.* Sullivant, 10 Wheat. 192, holding the same to be true of the United States courts, as not being courts of inferior jurisdiction.

does it not go too far, and invoke presumption where none may exist? Is it according absolute verity to the record under all circumstances, or is it impeaching the record under possible circumstances, upon the ground that it misrepresents what actually took place? Undoubtedly if the record is silent as to what was done in respect to some material matter, we will presume that what ought to have been done was done. If there is no proof of what was done in obtaining service, in the record, we will presume that legal service was in fact made; but when the record shows what was done for the purpose of obtaining service, how can we presume that something different was in fact done? Would that not be to join issue with the record, and dispute what it says, — which we have agreed cannot be done? When the record speaks at all, it must be understood to speak the truth as to the particular fact of which it speaks; for by the law of its creation it can tell no lies, neither direct nor circumstantial. This is so, not only when the record speaks in favor of the jurisdiction, but when it speaks against it.

"Pushed to its logical results, this doctrine, without some qualification, becomes equivalent to a rule that the judgment of a court of superior jurisdiction cannot be attacked at all in a collateral action, notwithstanding a want of jurisdiction may appear upon the face of the record. . . . . At least it is equivalent to saying that no judgment can be attacked collaterally, unless the record shows affirmatively, upon its face, that this is or that was not done, or that no service of summons was had upon the defendant, — language which, we venture to say, had never yet been found in any record. What do the cases mean when they speak of a want of jurisdiction appearing upon the face of the record? Do they mean a positive and direct statement to the effect that something which must have been done, in order to give the court jurisdiction, was not done? Or do they mean that a want of jurisdiction appears whenever what was done is stated, and which, having been done, was not sufficient in law to give the court jurisdiction? If the former, they are a delusion. . . . . For we venture to say that no case can be found, or will arise hereafter, where the conditions contemplated by such a rule will be found to exist. No court has ever yet so far stultified itself as to render a judgment against a defendant, and at the same time deliberately state that it had not acquired jurisdiction over his person.

"Suppose in a case of attempted personal service, the officer should return that he had served the summons upon A B, the son of the defendant, by delivering to him personally a copy, and also a copy of the complaint, and the remainder of the record is silent upon the question of service. Could we presume, in the face of such a record, that he served it on the defendant also? Undoubtedly not. There would be a want of jurisdiction upon the face of the record within the rule in hand; and the judgment would be declared a nullity whenever and wherever in support of a legal claim or right.

"We consider the true rule to be that legal presumptions do not come to the aid of the record, except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; but when the record states what was done, it will not be presumed that something different was done. If the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defendant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three.

"To avoid any misapprehension, we deem it proper to add that, so far, we have assumed, for the purposes of the argument, that the record, aside from that portion of it which is denominated the proof of service, is silent upon the question of service. But it may happen that other portions of the record may also speak upon that question. If so, what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it, and report the responses of all its parts. To illustrate: Suppose that portion of the judgment roll denominated the 'affidavit or proof of service' shows that personal service was made upon the son of the defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose that the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows; for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. So

in the case of a service by publication, if the affidavit of the printer states that the summons was published one month, and yet the court in its judgment states that it was published three, or that service has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made; for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

The learned judge then says that the principles above stated are limited to courts of superior jurisdiction; and he states the ground of the limitation to be the trust and confidence which the law places in the superior courts, and which it does not place in courts of an inferior or limited jurisdiction. The former are presided over by men more learned in the law, and their proceedings are conducted with greater solemnity and deliberation, than are those of the latter.

He then proceeds, with great ability, to meet a further limitation advocated by the defendants, founded upon the difference by which the superior courts are authorized to acquire jurisdiction, in the ordinary way of summons or appearance, and in the statutory way by publication; and he denies that any distinction exists making the record more conclusive in the one case than in the other. It was no answer, he said, that the defendant was subjected to a great hardship, if he could not impeach and contradict the record in a case of constructive service, by showing that the mode of service had not been strictly observed. The hardship in that case was no greater than where the statute had been strictly followed. The hardship, if any, lay in the fact that the defendant has had no actual notice; and the argument goes to the wisdom of allowing constructive service at all, and proves too much. He denied that the phrase "proceeding according to the common law," frequently used in reference to the superior courts, had any effect upon the question; indeed he thought there was very little meaning at all in the expression; it seemed to be used "merely from force of habit, or mainly for ornamental purposes." And there was no force, he said, in the suggestion that a court was exercising a general power when obtaining jurisdiction by actual service, and a limited or special power when doing so by constructive notice. The distinction was not to the power, for the power was the same in both cases, but merely as to the mode of exercising it.

We cannot further follow the able argument on this point; but we must say it is by far the most convincing presentation of the question we have found, as to whether the statutory notice by publication must be fully set out upon the record. The court put the two methods precisely on the same ground as to the matter of presumption. Each method, if set out in the record, must be according to law; in either case, if it affirmatively appear that the law is not complied with, the judgment is void; and in either case if the recitals are not full as to the jurisdictional facts, and if those that do appear do not show a want of jurisdiction, the presumption will be conclusively raised that other evidence was before the court sufficient to give it jurisdiction of the cause.

And we believe that the doctrine that the true criterion for determining whether the record must contain a full presentation of the jurisdictional facts in the former case is found in the extent and character of the general power of the court, rather than in the method prescribed for acquiring jurisdiction. The fact that courts of inferior or limited jurisdiction are not usually presided over by men thoroughly skilled in the law is sufficient reason why the proceedings in them, by which the right to try causes was acquired, should be closely inspected; and in order to this, jurisdictional facts should be fully spread upon the record. But the reason failing as to the superior courts, the rule should fail with it; and the jurisdiction of such courts should not be open to impeachment for the mere reason that not every step required to be taken is proved. It is of course competent for the legislature to prescribe that every step necessary to give a court jurisdiction should affirmatively appear on the record to have been taken, even of the proceedings of the superior courts; but until it has done so, it should suffice that the same presumptions, and only the same, should be raised in the case of the statutory notice as in the common-law notice.

But the weight of authority seems opposed to this doctrine;[1]

[1] Morse *v.* Presby, 25 N. H. 299; Carleton *v.* Washington Ins. Co., 35 N. H. 162; Embury *v.* Conner, 3 Comst. 322; Huntington *v.* Charlotte, 15 Vt. 46; Clark *v.* Bryan, 16 Md. 171; Bumstead *v.* Read, 31 Barb. 661; Arthur *v.* State, 22 Ala. 61; Harris *v.* Hardeman, 14 How. 334.

The case of Tibbs *v.* Allen, 27 Ill. 119, seems to support the doctrine of the California case. It was there adjudged, and in an appeal instead of in a collateral action, that the absence of an affidavit of the non-residence of the defendants from the record was not sufficient ground for reversal; the proceeding being one of notice by publication. So Falkner *v.* Guild, 10 Wis. 563,

unless there be ground for a distinction between the case of a superior court acting according to the common law, and when acting upon a matter as to which its powers, not merely its mode of acquiring jurisdiction, are limited by statute. But it is very doubtful if any such distinction can be properly made; for the court is still presided over by men skilled in the law; and its proceedings are still had with deliberation and solemnity. And Mr. Justice Fowler states the doctrine as well settled, that the judgments of courts of general jurisdiction while thus acting within statutory limits are open to examination, where all things necessary to the jurisdiction do not appear on the record; and that everything which does not distinctly appear by the record to be within the jurisdiction will be presumed to be without it.[1]

In the case, then, of inferior courts, and, according to the weight of authority, of superior courts when acting under limited powers, or not proceeding according to the course of the common law, the jurisdiction may be collaterally impeached in case all the facts necessary to give jurisdiction are not spread upon the record, or proved to exist.[2] And the English Court of Admiralty is an inferior court in this respect.[3] But the Federal courts of the United States do not belong to this class.[4]

And in all cases where the record, taken together, shows affirm-

also a case of statutory proceedings, but involved in a collateral action. Paine, J., speaking for the court, said: "The general rule in respect to such courts (superior courts) is, at all events where jurisdiction appears, that though the record does not show everything necessary to regularity, it is to be presumed unless the contrary expressly appears. And even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. It is true that proceedings under special statutes have sometimes been made an exception to this general rule as to presumption, even in courts of general jurisdiction. But without entering into the inextricable labyrinth of cases on the subject, we will only say that we can see upon principle no reason for the distinction. The general presumption in favor of the regularity of the proceedings of such courts is founded on the character of the court itself. And that character is the same, whether it act under a special statute or under the common law. I cannot see that a difference in the source of its authority to act can make any rational distinction as to the presumption in favor of the regularity of its action." See also Langworthy *v.* Baker, 23 Ill. 484.

[1] Carleton *v.* Washington Ins. Co., 35 N. H. 162, 167; Morse *v.* Presby, 25 N. H. 299, 302, and cases there cited.

[2] Rowley *v.* Howard, 23 Cal. 401; Clark *v.* Bryan, 16 Md. 171; Simons *v.* De Bare, 4 Bosw. 547; Steen *v.* Steen, 25 Miss. 513; Gray *v.* McNeal, 12 Ga. 424; Crawford *v.* Howard, 30 Maine, 422.

[3] Harris *v.* Willis, 15 Com. B. 709. In this case it was held that a plea of a judgment in admiralty, "after due proceedings had," and "in due form of law," was insufficient to show that the court had jurisdiction.

[4] McCormick *v.* Sullivant, 10 Wheat. 192.

atively that the court had not jurisdiction of the cause, that is, where the record contains express averments respecting jurisdictional facts, which show that in law jurisdiction was not acquired, in such case the judgment is null and void.[1] And this is true, though the party impeaching the judgment for want of jurisdiction be the one who instituted the proceedings alleged to be void.[2] And when the original proceedings were properly commenced, and jurisdiction obtained by the attachment of property in the hands of a trustee (garnishee), a *defect* in the notice that should subsequently be given to the principal defendant is an irregularity that will not render the judgment a nullity, though the defect may be sufficient cause for reversal in a court of error.[3]

But the rule that the jurisdiction of inferior courts is open to inquiry is subject to the following important qualification: If the inferior court has passed upon the jurisdictional facts, and found them sufficient, the parties and their privies are estopped in collateral actions to litigate the matter again.[4] This question was directly decided by the Court of Appeals of New York, in both of the cases cited. In Sheldon *v.* Wright the question arose as to the jurisdiction of a surrogate, under publication of an order for persons interested to show cause against the sale of certain property. The surrogate had decided that the publication was regular; and his judgment appeared on the record of the proceedings.

Mr. Justice Foot, in delivering judgment, said that the case differed in one particular from that of Dyckman *v.* New York, just cited. In that case, a summary proceeding, Dyckman had appeared and litigated the merits of the question; while in the present case the appellant had not appeared. "The question then arises," said he, "does his omission to appear place him in a more favorable condition for litigating the jurisdictional fact; or in other words, can a party to a judicial proceeding, by lying by and omitting to appear, acquire a right to open the proceeding at any time, and litigate in a collateral action a jurisdictional fact? It will be perceived at once that if the right depends on appearance or non-appearance, the fact that the party claiming it has been served with

[1] Penobscot Railroad Co. *v.* Weeks, 52 Maine, 456; Parish *v.* Parish, 32 Ga. 653; Mayo *v.* Ah Loy, 32 Cal. 477; Mercier *v.* Chace, 9 Allen, 242; Bruce *v.* Cloutman, 45 N. H. 37; Gay *v.* Smith, 38 N. H. 171.

[2] Mercier *v.* Chace, 9 Allen, 242.

[3] Carleton *v.* Washington Ins. Co., 35 N. H. 162, explained in Bruce *v.* Cloutman, 45 N. H. 37.

[4] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* New York, Ib. 434.

personal or statutory notice, makes no difference. If there is any difference, it is in favor of him who has been served with personal notice; for such a notice is in general more difficult to prove after a considerable lapse of time, than a notice by publication. . . . . It cannot be therefore that the acknowledgment or denial of the right of a party to a summary or other judicial proceeding, to disregard the record of it, and litigate collaterally a jurisdictional fact, depends on his appearance or non-appearance."

He then proceeded to state that the surrogate's decision as to the regularity of the publication conclusively determined the question of jurisdiction. Referring to the language upon the question of jurisdiction used in the cases of Borden *v.* Fitch,[1] Mills *v.* Martin,[2] and Latham *v.* Edgerton,[3] that "the want of jurisdiction is a matter that always may be set up against a judgment," he said that the judges only intended to say that the want of jurisdiction might always be set up against a judgment when that fact appeared on the record, or was presented in some other unexceptionable manner. The principle in Borden *v.* Fitch was opposed by no case within his knowledge, and it was simply this: that when a form or mode of notice of a judicial proceeding is prescribed by statute, and the party resides *within the territorial jurisdiction* of the State and court, a notice in the mode designated is sufficient to give the court jurisdiction. These were the facts in this case, but he refused to place his opinion on this ground, as that would recognize the right of the party to institute an inquiry respecting the jurisdictional fact. He rested his opinion "solely on the conclusiveness of the judgment of the surrogate."[4]

In the case of Porter *v.* Purdy,[5] there had not been, in point of fact, an adjudication. The proceedings in the case sought to be impeached were had under the statute authorizing the appointment of a certain number of freeholders to assess the expense of a certain improvement. One of the persons so appointed was not a freeholder; and it was contended that the proceedings were therefore

[1] 15 Johns. 121, 141.

[2] 19 Johns. 7, 33.

[3] 9 Cowen, 227, 229.

[4] This doctrine is well established. See Shawhan *v.* Loffer, 24 Iowa, 217; Bonsall *v.* Isett, 14 Iowa, 309; Segee *v.* Thomas, 3 Blatchf. 11; Hungerford *v.* Cushing, 8 Wis. 324; Bridgeport Savings Bank *v.* Eldredge, 28 Conn. 556; Bolton *v.* Brewster, 32 Barb. 389; Porter *v.* Purdy, 29 N. Y. 106; Kipp *v.* Fullerton, 4 Minn. 473; Galena and Chicago R. Co. *v.* Pound, 22 Ill. 399. But see Goudy *v.* Kipp, 30 Ill. 109, holding that such adjudication is *prima facia* evidence, and referred to in Secrist *v.* Grunn, 3 Wall. 744, as declaring the law of Illinois.

[5] 29 N. Y. 106.

void, by reason of a want of jurisdiction. But the court held otherwise.

Mr. Justice Mullin, who delivered the judgment, said that the principle to be applied was this: When, in special proceedings in courts or before officers of limited jurisdiction, they are required to ascertain a particular fact, or to appoint persons to act, having particular qualifications, or occupying some peculiar relations to the parties or the subject-matter, such acts, when done, are in the nature of adjudications, which, if erroneous, must be corrected by a direct proceeding for that purpose; and if not so corrected, the subsequent proceedings which rest upon them are not affected, however erroneous such adjudications may be.[1] It is indeed sometimes said that the entertaining cognizance of a cause is a conclusive finding of the facts constituting jurisdiction;[2] but this may be doubted; and it is not such an adjudication as is here intended.

In case of appearance by attorney, the question has arisen whether the parties are estopped to deny the attorney's authority. The question was recently brought before the Supreme Court of Indiana.[3] The plaintiffs in the case cited brought an action to have certain conveyances set aside, which had been made by virtue of a judgment against them in favor of the present defendants. They alleged that no notice had been given them of the former proceedings, and that certain attorneys had appeared and filed an answer for them without their knowledge or authority; and the court allowed them to disprove the authority.

Chief Justice Ray said: "We think the rule should be stated thus: Where a judgment is recovered in a court of general jurisdiction against a defendant, and the record shows that an attorney of the court appeared for the defendant, and filed an answer, the jurisdiction of the court cannot be controverted, unless it be by proof of fraud, which we are not in this case required to decide, or that the defendant was not a citizen of the State, nor during the pendency of the proceedings within the jurisdiction of the court in which the judgment was rendered, and had neither been notified of the pendency of the suit, nor had given authority to the attorney to enter an appearance for him."[4]

[1] See also Van Steenbergh *v.* Bigelow, 3 Wend. 42.

[2] Cox *v.* Thomas, 9 Gratt. 323; Clary *v.* Hoggland, 6 Cal. 685; Washington Bridge Co. *v.* Stewart, 3 How. 413.

[3] Wiley *v.* Pratt, 23 Ind. 628.

[4] He proceeds to fortify his position by showing that the rule has been so determined as to judgments of the sister States. Shelton *v.* Tiffin, 6 How. 163; Sherrard *v.*

But the contrary has been held, and in one case even as to the judgment of a sister State.[1] And considered on principle, this seems to be the better opinion. We have already seen that in the absence of anything in the record affirmatively showing that the court had not acquired jurisdiction, the jurisdiction of the superior courts will be conclusively presumed, at least when acting according to the course of the common law. And this principle shows that the parties and those claiming under them are estopped, in collateral actions, to dispute the authority of an attorney to appear. As to the question in the cases of judgments of the sister States, under the Constitution and act of Congress, the conclusion seems irresistible that in holding a different rule from that which must prevail in relation to judgments of the domestic courts, the plain language of the Legislature has been disregarded.[2]

Our next inquiry is in relation to the collateral impeachment of a judgment for fraud. Does the right exist? and, if so, when?

The early case of Meadows *v.* Duchess of Kingston[3] presented the question of the conclusiveness of a sentence in a suit for jactitation of marriage, involving the same marriage in question in the celebrated case of the Duchess of Kingston.[4] In the case first referred to, the sister and heir of the Duke of Kingston brought an action in chancery against the Duchess of Kingston, praying that a will made by the Duke might be declared void by reason of fraud and imposition on the part of his pretended wife, the Duchess. The will had given her all his property, under the description of his *wife*. The fraud and imposition alleged were that the defendant had deceived the Duke, before their marriage, into the belief that she was single, whereas she was declared at that time and still to be the lawful wife of one Hervey. The bill then charged that the quality of wife was an essential part of the will, and that it expressed the cause of the bequest; and it insisted that the cause and motive, by reason of the imposition, did not exist, and that

Nevius, 2 Ind. 241; Bodurtha *v.* Goodrich, 3 Gray, 508. See also White *v.* Jones, 38 Ill. 159.

[1] Warren *v.* Lusk, 16 Mo. 102; Baker *v.* Stonebraker, 34 Mo. 172; Finneran *v.* Leonard, 7 Allen, 54; Watson *v.* Hopkins, 27 Texas, 637; Brown *v.* Nichols, 42 N. Y. 26.

[2] The case of Warren *v.* Lusk, 16 Mo. 102, above cited, is one of the very few cases in which the constitutional provision and act of Congress, in relation to the judgments of the sister States, have been strictly and faithfully followed. The court there denied the right to dispute the attorney's authority to appear. The point will be fully presented in the chapter on Foreign Judgments *in Personam*.

[3] Amb. 756.

[4] 20 How. St. Tr. 358.

therefore the bequest could not take effect. It then prayed an account, and that the defendant might be held a trustee for the plaintiff. The plea alleged a suit for jactitation of marriage against the said Hervey; and that upon a fair trial, upon cross-allegations by Hervey insisting that she was his wife, the court declared that she, the present defendant, was a spinster, and free from all matrimonial alliance, "so far as appeared," with the said Hervey. The imposition was then denied generally.

As against this judgment the plaintiff contended that it was not conclusive; that the words "as far as it appears" showed that it was not definitive, and therefore not conclusive; also that it might be avoided at the hearing by evidence of fraud and collusion. But the court decided the matter the other way.

Apsly, Ch., said: "By 'conclusive' I understand that the court will not receive evidence to contradict it. I lay it down as a general rule, that wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment shall be received as conclusive evidence of the matter so determined. In Noell *v.* Wells,[1] the court would not receive evidence to prove that the will was forged, in contradiction to the probate. All the cases cited import the same rule. Temporal courts must take notice of the forms of sentence in ecclesiastical courts. . . . . The only exception to the rule is, where the sentence is not *ex directo*, according to the distinction in Blackham's Case.[2] In the case of Robins *v.* Crutchley,[3] the sentence was not *ex directo;* here the question was direct, 'married or not.'

"It was said that fraud in obtaining the sentence might be given in evidence. In Barnesley *v.* Powell,[4] Lord Hardwick took a distinction between fraud upon the testator and fraud after his death. 'In the former case,' he said, 'this court would not meddle.'. . . . Fraud upon a court in obtaining judgment or sentence can only be examined by the court where the fraud is committed, or another court having concurrent jurisdiction in questions of marriage."

On a subsequent day the chancellor mentioned another case[5] upon the subject. It was a case of an indictment for forging a will; and on the trial the forgery was proved. But on the defendant's producing a probate of it, that was held to be conclusive evidence

[1] Lev. 235.
[2] 1 Salk. 290.
[3] 2 Wils. 122.
[4] Amb. 102.
[5] Rex *v.* Vincent, 1 Strange, 481.

in support of the will. He also referred to another case,[1] in which a question of marriage arose. The defendant gave in evidence her marriage with M.; and the plaintiff showed a sentence annulling the same, which was relied on as conclusive. And so it was agreed, as the report in Ambler states, unless the defendant might be permitted to show fraud in obtaining it. But Willes, C. J., after much debate, took a distinction between the case of a stranger who cannot come in and reverse the judgment, and therefore must of necessity be permitted to allege fraud, and the case of one who, like the defendant, was a party to the proceedings. Such a person could not prove that the judgment had been fraudulently obtained.

In regard to the principal case above presented (Meadows *v.* Duchess of Kingston), it is plain that the "general rule" declared by the chancellor must be restricted to cases of judgments *in rem;* for it needs not the citation of authorities to show that judgments *in personam* do not bind third persons. Indeed, if the case above cited by the chancellor as decided by Chief Justice Willes be correct, the reason why the plaintiff could not allege that the judgment in question had been obtained by fraud must have been that she, as a party in interest, might have directly attacked it.

The question of the impeachment of judgments for fraud was directly before the court in the Duchess of Kingston's Case. Lord Chief Justice De Grey, in pronouncing the opinion of the court, said: "In civil suits all *strangers* may falsify for covin, either fines or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this whether the covin is apparent upon the record, as not assoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral security, or other advantageous pleas.

"In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser whose conveyance would be affected as it stands; and even after a conviction by verdict, he may traverse the time.

"In the proceedings of the Ecclesiastical Court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the

[1] Prudam *v.* Philips, 2 Strange, 961, note.

first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it.

"In the modern cases, the question seems to have been whether the *parties* should be permitted to prove collusion, and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the court of temporal jurisdiction."

The doctrine of these cases then is, that no one who was a party to the former proceedings, or who might have intervened in or appealed from them, can, in a collateral proceeding, allege that the judgment was obtained by fraud; while the contrary is true as to persons who could not have thus intervened or appealed.

There are other cases which support this doctrine.[1] The case first cited was a suit in chancery, and came before the court upon exceptions to the master's report. The question was, how far a sentence of the Ecclesiastical Court of nullity of marriage was binding in chancery on a child of the alleged marriage, who was *en ventre de sa mere* at the time of the sentence. The facts were, in substance, that a marriage which had been solemnized between A and B was declared void by the Ecclesiastical Court. Some time afterwards a child of A and B, *en ventre de sa mere* at the time of the sentence, and who could not therefore have been a party to the proceedings, claimed property as descendant of A. He attempted to impeach the sentence for fraud; but the court held that the matters alleged were insufficient to constitute fraud. The opinion however was expressed that the complainant was not estopped to prove fraud if he could.

In the American courts there have been many contrary *dicta*

[1] Perry *v.* Meadowcroft, 10 Beav. 122; Meadowcroft *v.* Huguenin, 4 Moore, P. C. C. 386. But see Bandon *v.* Becher, 3 Clarke & F. 479, holding that a judgment of the Court of Exchequer may be attacked for fraud, when set up as a defence in chancery, between the parties or privies.

By a recent English statute (23 & 24 Vict. ch. 144, § 7) it is provided that *any* person may intervene in a divorce case, before the decree is made absolute. See Bowen *v.* Bowen, 3 Swab. & T. 530. *Quære:* Is this in affirmance of the common law? If so, can the rule that judgments are not subject to impeachment for fraud have any exception, save where there was a physical impossibility to intervene, as in the case of one who was *en ventre de sa mere* at the time of the decree?

which have created some confusion. The expression is very commonly found in the *obiter* opinions of our courts, that the judgments of courts are liable to impeachment for want of jurisdiction and for fraud. We propose to examine the cases and ascertain how far these expressions as to impeaching judgments as obtained by fraud are entitled to credit.

In a recent case,[1] the complainants in a bill in equity sought to prove collaterally that a certain judgment had been obtained by fraud, and although it did not seem to be doubted that this could be done, there was no question raised on the point, and no decision of it made. The court only held the evidence insufficient to constitute fraud.[2] They do however say, in the course of their opinion, that "while a judgment is conclusive upon parties and privies, and cannot be impeached, still, in equity, it may be vacated and set aside where it has been procured by collusion." But this language refers to a direct and not to a collateral proceeding.

In Great Falls Manufacturing Company *v.* Worster,[3] the defendants were allowed to impeach a judgment for costs obtained by the plaintiffs; but they were sureties, and not parties to the former action. The court say there is no doubt that a judgment may be collaterally impeached by a third person, not party or privy to it, upon the ground of collusion with intent to defraud him. This case is therefore in strict accord with the English cases above presented.[4]

In Edgell *v.* Sigerson,[5] the court squarely state that if the judgment there relied on as an estoppel were obtained by fraud, it was void; but this was a *dictum*. The question actually before the court was, whether in pleading under the new practice, to avoid the estoppel of a judgment, it was sufficient to allege that it was obtained by fraud, without stating the facts constituting the fraud. Counsel did not deny that fraud was a proper ground of impeachment; the question rather went by default.

In the case of Jackson *v.* Summerville,[6] the judgment was founded on a forged deed; and the question was whether the judgment could be overturned on this ground. The court ad-

[1] Field *v.* Flanders, 40 Ill. 470.

[2] See People *v.* Phœnix Bank, 7 Bosw. 20; People *v.* Townsend, 37 Barb. 520; Fisk *v.* Miller, 20 Tex. 579; Carr *v.* Miner, 42 Ill. 179.

[3] 45 N. H. 110.

[4] To the same effect, Mitchell *v.* Kintzer, 5 Barr, 216; Callahan *v.* Griswold, 9 Mo. 775; Atkinson *v.* Allen, 12 Vt. 619; De Armond *v.* Adams, 25 Ind. 455.

[5] 20 Mo. 494.

[6] 13 Penn. St. 359.

mitted that a judgment rendered by a court of competent jurisdiction, upon the point in issue, could not be overturned in a collateral proceeding; but they said *there never had been a judgment as to whether the deed was obtained by fraud.* "That decree," said they, "was rendered upon the faith of the fact that the Summervilles were legally and honestly represented by Jackson. But if the deed were fraudulent and void, the title never passed out of the Summervilles, but still resides in their legal representatives. While therefore the decree is good as against the interest honestly represented before the court, it is void as against the interests not represented [at] all; that is, not represented in the eye of the law. . . . . As to that interest, the decree of the court was, as it were, *coram non judice.*" This case, then, does not seem to directly decide that fraud is a good ground for impeaching a judgment.

The only cases which we have been able to find in which it has been directly decided that a judgment may be collaterally attacked for fraud, by the parties or their privies, are Hall *v.* Hamlin,[1] and State *v.* Little.[2] There have been *dicta* to the same effect by other cases not already cited.[3]

But the cases which have decided the question the other way are not so few or so obscure. The point was directly raised in a recent case in the Supreme Court of Iowa.[4] The offer to prove that the judgment had been procured by fraud was rejected in the court below; exceptions were taken, and the ruling was sustained on appeal. The court said: "If a judgment can be attacked for fraud in any case, it can only be by a direct proceeding."[5] And in a late case in Tennessee the same doctrine was held even as to a judgment rendered by a justice of the peace.[6] The attempt there was to rectify a judgment obtained by fraud, by bringing a new action for the same cause; but the court held the former judgment a bar.

The point has been thus decided also as to the judgments of the sister States.[7] And the strongest case upon the subject is one of this class, recently determined in the Supreme Court of the United States;[8] and there can now be no doubt that the plea of fraud, by

[1] 2 Watts, 354.

[2] 1 N. H. 257.

[3] See Smith *v.* Keen, 26 Maine, 411; Thouvenin *v.* Rodriques, 24 Texas, 468; Hartman *v.* Ogborn, 54 Penn. St. 120.

[4] Smith *v.* Smith, 22 Iowa, 516.

[5] Mason *v.* Messenger, 17 Iowa, 261.

[6] Kelley *v.* Mize, 3 Sneed, 59. See also Van Doren *v.* Horton, 1 Dutch. 205.

[7] Anderson *v.* Anderson, 8 Ohio, 108; McRae *v.* Mattoon, 13 Pick. 53.

[8] Christmas *v.* Russell, 5 Wall. 290.

parties and privies, is unavailing to disturb the effect of an otherwise valid judgment.[1] The rule, however, is otherwise as to judgments rendered in foreign countries.[2] We shall refer to this point fully in its appropriate place.

Under what circumstances judgment creditors may impeach the judgment for fraud was considered in the case of Dougherty's Estate,[3] by Chief Justice Gibson. In that case the creditors objected to a prior judgment, that it was fraudulent, and given without consideration; and they asked for a jury to try the allegations. This was refused, because no collusion had been alleged. In a subsequent and recent case,[4] the same court, upon similar facts, reaffirm this doctrine. Mr. Justice Strong, now of the Supreme Court of the United States, speaking for the court, said: "Where a collusive judgment comes into collision with the interests of creditors, they may avoid the effect of it by showing it to be a nullity *as to themselves;* and in doing so, they do not impair its obligation between the original parties, upon whom it is undoubtedly binding; a fraudulent judgment, like a fraudulent deed, being good against all but the interests intended to be defrauded by it. But they cannot call upon the court to vacate it on the record, which would annul it as to the whole world." It follows, as a matter of course, that if the judgment creditors cannot vacate the judgment, they cannot collaterally impeach it merely because it was a fraud upon the debtor. To enable them to do so, it must have been a fraud upon themselves; and this proposition the learned judge so states in his opinion.[5]

Next, as to impeaching the judgments of inferior courts. We have already seen, in general, that if the jurisdiction of the inferior court is established, there can be no reinvestigation of the matters decided.[6] Possibly there may be an exception allowing the impeachment of the judgments of such courts for fraud, by reason of the fact that fraud in procuring judgments there is more easily accomplished than in the superior courts; but the better opinion seems adverse to the proposition.

However this may be, there is one important qualification to the

[1] See also Boston & W. R. Co. *v.* Sparhawk, 1 Allen, 448; Kirby *v.* Fitzgerald, 31 N. Y. 417; Hammon *v.* Wilder, 25 Vt. 342, 346.

[2] Cammell *v.* Sewell, 3 Hurl. & N. 617.

[3] 9 Watts & S. 189.

[4] Thompson's Appeal, 57 Penn. St. 175.

[5] So also Lewis *v.* Rogers, 16 Penn. St. 18: "Creditors can attack a judgment collaterally only for collision." Gibson, C. J.

[6] See *ante*, p. 16; also Skinnion *v.* Kelley, 18 N. Y. 355.

rule, which is this: That proceedings of inferior courts which cannot be reviewed in an appellate tribunal may be collaterally attacked, if the party seeking to avoid them be in a legal position to do so.[1] He cannot do so if he has waived his rights.[2] The case cited was one concerning the laying out of a highway; but the court held the party seeking to avoid the proceedings as not in a position to object to them.

The court mention the following instances in which the right of inquiring into the judgment is proper: "The proceedings of two justices of the quorum in granting a poor debtor's discharge, the acts of fence-viewers, and ordinarily the doings of selectmen."[3]

It has been held that the principle that a party cannot collaterally impeach a judgment on any ground which might have been pleaded or relied on as a defence to the suit, does not apply to the case of parties under disabilities, as married women.[4] In the case cited, judgment by default had been rendered against a *feme covert* in a suit upon a promissory note; and an injunction having been obtained to restrain the former plaintiff from obtaining satisfaction of the judgment, the court refused to dismiss it.

But the doctrine seems very questionable; for the woman had a remedy by appeal, or by a direct proceeding to vacate the judgment, unless she had lost her rights by failing to defend the former suit. And such a case would not give her a remedy in a collateral proceeding.

[1] Gurnsey *v.* Edwards, 26 N. H. 224.

[2] Ibid.

[3] Robbins *v.* Bridgewater, 6 N. H. 524; Gear *v.* Smith, 9 N. H. 63; Sanborn *v.* Fellows, 22 N. H. 473; Harlow *v.* Pike, 3 Greenl. 438.

[4] Griffith *v.* Clarke, 18 Md. 457.

CHAPTER IV.

DOMESTIC JUDGMENTS IN REM.

We proceed now to the consideration of judgments which avail against all persons, to wit, judgments *in rem*. The general distinction between this class and the class just under consideration was pointed out on a preceding page.[1]

Most of the questions relating to this division of *res judicata*, so far as the subject of this work is concerned, are common with those relating to judgments *in personam* of the domestic courts, the subject of the preceding chapter, and to foreign judgments *in rem*. The latter, as we shall see, stand substantially upon the same footing with the present class of judgments, with certain exceptions to be noticed hereafter. In this connection, we shall therefore consider only some of the general features of this class of estoppels; referring the reader to the chapters mentioned for further details.

The most familiar instance, perhaps, of the operations of judgments *in rem*, is in the case of adjudications of prize in the Admiralty; and it has been often determined that such adjudications are conclusive upon all persons, not only of the change of property, but also of the fact for which the condemnation was pronounced.[2] Questions of the conclusiveness of sentences of this character have, however, generally arisen in relation to the adjudications of foreign courts; and the subject will be fully considered in its appropriate place.[3]

Cases of adjudication in the Court of Admiralty in matters of collision afford also a familiar illustration of the operation of judgments *in rem*. In a recent case,[4] it was held, in an action upon a policy of insurance for a loss by collision at sea, that a decree of the Admiralty that the collision had been caused by the negligence of the vessel insured was conclusive of the fact; and the

[1] *Ante*, pp. 9 *et seq.*

[2] Hughes *v.* Cornelius, 2 Show. 232; S. C. Ld. Raym. 473; Skin. 59; Carth. 32; Croudson *v.* Leonard, 4 Cranch, 434; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600.

[3] Under Foreign Judgments *in Rem*.

[4] Street *v.* Augusta Ins. Co., 12 Rich. 13 (1859).

insurers were exonerated from indemnification for the damages which the owners of the vessel insured had been compelled to pay, by reason of their negligence, to the owners of the other vessel.[1]

The court, Wardlaw, J., said that the only evidence they had of the collision, and of its attendant circumstances, was the transcript of the proceedings of the District Court; but this was sufficient. It showed the judgment of a court of competent jurisdiction proceeding *in rem;* and such judgment was binding on all persons interested in the thing upon which the process was served. Insurers, as persons having an interest in the thing arrested and made the subject of adjudication, were bound, even by the sentence of a foreign prize court, and much more so by the decree of the Admiralty at home.

The court further said that the case was not changed by reason of the fact that the vessel had been delivered to the present plaintiffs, claiming as owners, under their stipulation. This fact did convert the case into a proceeding *in personam.* The stipulation was a substitute for the vessel; and the decree was made, not against the persons, but against the vessel.

The case of Hart *v.* M'Namara[2] shows the line of distinction between judgments *in rem* and *in personam*, in municipal causes before the Court of Exchequer. It was an action for the price of liquor sold by the plaintiff. The defence was that the liquor was adulterated. To prove the adulteration, the record of condemnation of the rum was offered in evidence; and to connect the plaintiffs with the cause of condemnation, a record was offered in evidence of proceedings by the crown against the defendant for penalties, in which the defendant was convicted.

Gibbs, C. J., held that the record of condemnation was admissible, being *in rem;* but he refused to admit the record of conviction for penalties, stating that as it was *in personam*, it was not evidence in any case where the parties were different.

That the record of condemnation of goods in the Exchequer is conclusive upon all persons, was determined as long ago as in 1775, in Scott *v.* Shearman.[3] This case was an action of trespass against custom-house officers for entering the plaintiff's house and seizing his goods. The defendants justified under a record of condemna-

[1] They were not, of course, excused from paying for the direct damage to the vessel insured.

[2] Reported in note, 4 Price, 154.

[3] 2 W. Black. 977.

tion in the Exchequer. The cause was twice argued, and underwent great examination. Counsel contended that the condemnation was only conclusive of the right of the crown to the goods, but not conclusive in case the owner could prove that in point of fact they were not seizable, and should choose to bring an action against the person seizing for damages, by way of collateral remedy. And Mr. Justice Blackstone was at first disposed to adopt the distinction; but upon the second argument he and all the other judges decided that the action could not be maintained.

"The only possible ground," said the great authority just referred to, "that the plaintiff can rely on in the present case, which is unaccompanied with misbehavior or any unwarrantable violence, is that the goods were not in truth liable to be seized by the laws of the customs; although by the plaintiff's default they have been condemned in the Exchequer. But I take this condemnation to be conclusive evidence to all the world that the goods were liable to be seized, and that therefore this action will not lie.

"1. Because of the implicit credit which the law gives to any judgment in a court of record having competent jurisdiction of the subject-matter; the jurisdiction in this case of the Court of Exchequer is not only competent, but sole and exclusive. And though it be said that no notice is given to the owner in person, and that therefore he is not bound by the condemnation, not being a party to the suit, yet the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king's warehouse. He knew, or might have known, that by the course of law the validity of that seizure would come on to be examined in the Court of Exchequer, and could be examined nowhere else. He had notice by the two proclamations, according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim, and trying the point of forfeiture, it was his own laches, and he shall be forever concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it would be nugatory to debar him from recovering *directly* the identical goods that are condemned, if he is allowed to recover *obliquely* damages equivalent to their value.

"2. Because, the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation (as is clear beyond any dispute, and conceded on the part of the plaintiff), it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seizure.[1] The spirituous liquors that were seized were, therefore, at the time of the seizure, the goods and chattels of his Majesty, and not of the plaintiff, as in his declaration he has necessarily declared them to be; since neither trespass nor trover will lie for taking of goods, unless, at the time of the taking, the property was in the plaintiff."

Chancellor Kent, in Gelston *v.* Hoyt,[2] referring to this case, says that the law is settled clearly, uniformly, and definitely, that if goods be seized by a custom-house officer, and are libelled, tried, and *condemned* in the Exchequer, District, or other court having cognizance of the forfeiture, trespass will not lie against the officer who seized the goods.

But the great question in the case before Chancellor Kent was, whether, in case of an *acquittal* of the goods, the officer, when sued for the seizure, could contest the legality of the seizure again. "This is," he said, "the very point and pith of the controversy; and I entertain no doubt it is equally well settled as the other, and that if the condemnation is a bar to the action on the one hand, the acquittal is a bar to the defence on the other. It would be monstrously unjust, and repugnant to all principles, if the rule were not so. Ought not the parties to be placed upon equal ground? and if the sentence of condemnation be conclusive in favor of the seizing officer, ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every man of common understanding that the rule, to be just, should be equal and impartial in its operation." He then proceeds to state that the authorities are on the same side,[3] with one exception.[4]

"The reason," he goes on to say, "assigned in Buller's N. P.

[1] The record of condemnation is conclusive, not only that the goods were liable to seizure at the time of the sentence, but also that they were so liable at the time they were imported. Whitney *v.* Walsh, 1 Cush. 29.

[2] 13 Johns. 561, 583.

[3] 12 Viner, 95, A. b. 22, 1; Cook *v.* Sholl, 5 T. R. 255.

[4] Buller, N. P. 245.

why an acquittal is not conclusive in a collateral action, as well as a condemnation, is that an acquittal *ascertains no fact*, as a conviction does. This is the reason assigned. Thus, it is said, if a party be indicted for bigamy, and convicted, it must have been a full proof that he was twice married, and could not have been on any other ground; but if he was acquitted, it might have been because he had reason to believe his first wife was dead, though she was not dead; or it might have been for many other reasons, without supposing the second to have been a lawful marriage. All this may be true in that and like cases; but in a case in the Exchequer, where the goods are themselves seized and libelled as forfeited to the government, and which is termed a proceeding *in rem*, the question of forfeiture is the only question that can be made; and a decree of acquittal does ascertain the fact that they were not forfeited. Indeed, in the next preceding page in Buller, an adjudged case is given which completely overturns his distinction. It is the case of Lane *v.* Degberg,[1] decided in 11 W. 3, prior to the decision before Baron Price.[2] It was an action by a soldier against his officer for an assault and battery. The officer justified the act as done in the army for disobedience, and gave in evidence the sentence of a council of war, founded on a petition of the plaintiff against him, and the acquittal, being the sentence of a court of exclusive jurisdiction, in a case arising under martial law, was held to be conclusive evidence for the officer in the action for the assault and battery."

The foregoing case of Gelston *v.* Hoyt was taken to the Supreme Court of the United States, and the judgment was there affirmed.[3] Mr. Justice Story, who delivered the opinion, referring to the passage from Buller, said that though it might be good law in respect to criminal suits, it had no application to proceedings *in rem*. "Where property," said he, "is seized and libelled as forfeited to the government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not. The decree of the court in such case acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. If, on the other

[1] Buller, N. P. 244.

[2] 12 Viner, 95, A. b. 22, 1, *supra*.

[3] 3 Wheat. 246. See also Slocum *v.* Mayberry, 2 Wheat. 1.

hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be reannexed to it. The original owner stands upon his title discharged of any latent claims with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem* does therefore ascertain a fact, as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claim of forfeiture."

The effect of a decree establishing a pedigree was presented in the case of Ennis *v.* Smith.[1] The action was brought against the administrator of the estate of General Kosciusko, by persons claiming to be his heirs. To prove their relationship, they produced decrees of their family pedigree by the Court of Nobility of Grodno, and another of the Court of Kobryn, in the Russian province of Lithuania. The jurisdiction of these courts having been proved, the Supreme Court of the United States held that the proceedings were *in rem*, and evidence against all the world of the matters of pedigree adjudicated.

That proceedings in marriage and divorce cases also belong to this class seems so well settled as to scarcely need the citation of authorities.[2] The application of the doctrine, however, needs some examination.

In order that proceedings in divorce cases should estop third persons, it is not sufficient that the jury have given a verdict that the complainant's charges are true, if the verdict has not been followed by judgment of dissolution of marriage.[3] The case cited for this proposition was an action to recover the value of necessaries supplied by the plaintiff to the wife of the defendant, whilst living apart from him. The defence was that the agency of the wife had been destroyed by the fact that she had been found guilty, in the Divorce Court, of having committed adultery. The proceedings in that suit showed that the adultery of the wife had been established, but that there was no decree of dissolution of marriage, by reason of the finding of the jury that the husband had also been guilty of adultery. The present cause of action accrued subsequently to the suit for divorce.

The opinion of the court was pronounced by Erle, C. J., who

[1] 14 How. 400.

[2] See Bishop, Marriage and Divorce, § 754 (4th ed.), and cases cited. But see Gill *v.* Read, 5 R. I. 343.

[3] Needham *v.* Bremner, Law R. 1 Com. P. 583.

said that the judgment of the Divorce Court had not altered the *status* of the parties. The woman still continued to be the wife of the defendant. The case, he continued, did not fall within the class of cases where the sentence put an end to the relation of husband and wife. There was nothing here but the mere verdict of a jury, binding as between the parties, but not as against other persons who came to litigate the same question.[1]

The decrees of the Court of Probate are also conclusive, when acting within its jurisdiction, upon all persons.[2] The case first cited was a petition for appointment as administrator as matter of right; alleging that the respondent claimed to be administrator of the same estate, but that he had not been legally appointed, that he was not entitled to the position, and that he was an improper person for it. In reply, the defendant set forth his appointment by a court of probate, at the request of certain heirs and next of kin of the intestate, and that no appeal had been taken from the order. The defence was held good.

The Supreme Court said they could not in a collateral way review the correctness or propriety of a decree of a court of probate acting within its jurisdiction. Whether the defendant were a proper person to be appointed administrator, and whether a request by only a part of the next of kin was sufficient to warrant the grant of letters, were questions properly arising before the court; and if petitioner felt aggrieved, he should have appealed.

In the case of Loring *v.* Steineman, just cited, Shaw, C. J., had occasion to say: "In many cases, courts of peculiar jurisdiction have jurisdiction of the subject-matter absolutely, and persons are concerned incidentally only, according to their respective rights and interests; as in a question of prize, the jurisdiction of the Court of Admiralty extends to the question whether prize or not, and, by adjudicating upon that question, settles it definitively, in regard to all persons interested in that question, whether they have notice or not. And we think the distribution of an intestate estate is analogous. The subject-matter, the property, is within the jurisdiction of the court, and the judgment, by determining who

[1] Questions relating to the conclusiveness of decrees as to marriage and divorce have more frequently arisen in cases of foreign decrees; and the reader is referred to the chapter on Foreign Judgments *in Rem* for further information.

[2] Lawrence *v.* Englesby, 24 Vt. 42; Farrar *v.* Olmstead, Ib. 123; Steen *v.* Bennett, Ib. 303; Loring *v.* Steineman, 1 Met. 204.

are entitled to distributive shares, and extending to the entire estate, determines that no other persons are entitled, and is necessarily conclusive, because nothing further remains to be distributed." [1] And the same doctrine and reasons apply to proceedings in insolvency.[2]

A confirmation of an order of removal of a pauper concludes the appellant in favor of all the world.[3] In West Buffalo *v.* Walker, just cited, Gibson, C. J., says that there are three modes of disposing of an order of removal, each having a different effect as to conclusiveness. The first is by confirmation, which, as has been stated, is conclusive in favor of strangers; the second is by discharging the order, in which case the adjudication is conclusive only between the parties litigant; the third is by quashing it, in which case the order is not conclusive upon any one.

An order of removal, the learned chief justice said, was confirmed after an unsuccessful objection to it, for want of merits, or for want of form, or for want of regularity; it was discharged, or vacated, after a successful objection to it on the merits; and it was quashed for informality or irregularity of proceeding. The order to quash was like a reversal on a writ of error, leaving the parties where they began.[4]

So, too, in the case of a decree in Louisiana appointing a tutor to a minor, if rendered by a court of competent jurisdiction, the judgment cannot be impeached in any collateral action by a debtor of the minor.[5] "So long," said Mr. Justice Buchanan, "as that judgment stands unreversed, it constitutes a full warrant for the demand and collection, by the person therein named as tutor, of debts due to the minor."

A judgment confirming the report of commissioners appointed to establish the boundary line between adjoining towns, under a statute of New Hampshire, also concludes all persons.[6] In the

[1] See also Litchfield *v.* Cudworth, 15 Pick. 23; Vanderpoel *v.* Van Valkenburgh, 6 N. Y. 190; Bogardus *v.* Clark, 4 Paige, 623; Fry *v.* Taylor, 1 Head, 594; Cecil *v.* Cecil, 19 Md. 72.

[2] Merriam *v.* Sewall, 8 Gray, 316, 327.

[3] Rex *v.* Cirencester, Burr. Sett. Cas. 18; Rex *v.* Bentley, Ib. 426; West Buffalo *v.* Walker, 8 Barr, 177. See Cabot *v.* Washington, 41 Vt. 168.

[4] See Rex *v.* Bradenham, Burr. Sett. Cas. 394, as to which Chief Justice Gibson says that the expression "quashed on the merits" was inadvertently used for "discharged."

[5] Succession of Gorrisson, 15 La. An. 27. See also Cailleteau *v.* Ingouf, 14 La. An. 623.

[6] Pitman *v.* Albany, 34 N. H. 577.

case cited, Sawyer, J., said that it was manifest that great mischief would result if the question, when any doubt arose, should be left in a precarious and fluctuating condition, so that one jury should be permitted to find one way, and another another way, as to the boundary. Public interest and the rights of individuals required that the matter be settled by an adjudication directly upon the matter that should be final and conclusive upon all the world.

But the court further decided that the judgment was equally conclusive as to where the boundary had previously been. The learned judge said: "To determine what the effect of the adjudication since the commencement of this suit is to be, as to the rights of the parties involved in it, it is only necessary to understand what the character of the proceeding is, under the provisions of the statute which declares it final. It is not a proceeding relating to private transactions, or in a controversy between individuals or particular parties. The adjudication is not directly for the purpose of determining private rights, or deciding a controversy between party and party. It relates to a subject of a public nature, beyond the rights of litigants, and is strictly a proceeding *in rem*. Its object is to declare the state, condition, or situation of the subject-matter, the true location of the boundary, in a proceeding instituted under the provisions of the law for that object only. In this adjudication, it is not merely declared what is to be the recognized and established boundary thereafter. The judgment pronounces where the true boundary is, as established by the only competent authority to limit and define it, — the legislative act. . . . . In decreeing where the boundary is, as thus established, it is necessarily declared also where it always has been, since the proper power was exercised in establishing it by the legislative act, or the grant from the king, if established during our colonial history; and also where it always will be until altered by like competent authority."

We have already sufficiently adverted to the fact that proceedings in attachment, replevin, and the like, are not proceedings *in rem;* though they are sometimes spoken of as such.[1] The point has been judicially determined in several cases, as we have seen, that those proceedings affect only the actual parties to the litigation, and those who claim through them.[2]

[1] *Ante*, pp. 9 – 11.

[2] Mankin *v.* Chandler, 2 Brock. 125, Marshall, C. J.; Megee *v.* Beirne, 39 Penn. St. 50; Woodruff *v.* Taylor, 20 Vt. 65; The Bold Buccleugh, 7 Moore P. C. 267, 282.

A distinction is taken and must be noticed between those cases which incidentally establish reputation, custom, a public ferry, and matters of the like character, and judgments strictly *in rem*. The latter bind third persons; or, in plainer terms, they are conclusive evidence against all the world. The former may in certain cases be evidence, but they are not conclusive.[1] And the distinction is this: In the case of proceedings purely *in rem*, the direct object of the action is to determine the *status* of the thing involved; and its binding force depends on the scope of the proceedings. This is usually so wide as to estop all persons in the world; but it is very readily conceivable that the scope of an action strictly *in rem* might be limited in its effects. For instance, in an action under a local statute to determine the *status* of a thing, the scope of the proceedings might be limited in its binding force to persons within the jurisdiction of the local law; while an adjudication of *status*, under the law of nations, may be, and usually is, sufficiently comprehensive to embrace and bind all the world. Two things then seem necessary to make an adjudication binding as an estoppel upon third persons: 1. The direct object of the action must be to determine the *status* of the thing; 2. The scope of the action must be sufficiently broad to embrace third persons.

Neither of these elements exist in the cases first mentioned. The *quasi status* there established is not the direct object of the litigation, but is a mere incident, necessary perhaps, in a limited sense, to the determination of the particular question in hand, but still incidental. In the case of Pim *v.* Curell, above cited, the direct object of the suit was to recover tolls; and though it was necessary to the recovery to establish the existence of a ferry, still it was not necessary to establish *a* ferry in general. In other words, the scope of the suit was to determine the right to tolls *as between the plaintiff and the defendant*, and not as between the plaintiff and all the world. It was not necessary, therefore, to examine the question of the existence of the ferry in all possible bearings, but only in its relations to two persons. Had the object of the suit been to establish the fact of a ferry against all the world, the question would have required a more thorough and a wider examination. Moreover, a general *status* could not be determined in an action for tolls, though there were a hundred defendants; for the scope of such a suit could only be broad enough to bind those very parties. The object of such a

[1] Pim *v.* Curell, 6 Mees. & W. 234; Carnarvon *v.* Villebois, 13 Mees. & W. 313.

suit would be to establish the plaintiff's right to tolls against a certain number of persons; and the existence of the ferry would be proved merely to establish the right as against *them*. The point of distinction then, in a word, is, that in the cases first mentioned the *quasi status* has been determined only incidentally and with reference to a few persons; and it has not received that exhaustive examination required in the case of pure proceedings *in rem*. And these remarks apply to all those cases determining a similar sort of limited *status*, which are suggested in the books, such as that found in judgments in ejectment, writs of right, etc.;[1] and they show that such adjudications cannot estop third persons, even if evidence at all against or for them.

It has been held, under a statutory provision, that an unsatisfied judgment against a vessel is no bar to a suit *in personam* against the owners for the same cause of action.[2] The court, in the case cited, said that if the action were strictly *in rem*, it was clear that no judgment could be rendered that could be enforced against any other property belonging to the owner. It was therefore evident that a judgment against the vessel was not even substantially a judgment against the owners, and that consequently the former recovery relied on was no bar to the present action.

Dr. Lushington has, however, expressed a contrary view, even as to foreign decrees, in a *dictum* in a recent case; but no statute was mentioned as governing the rule.[3]

Questions relating to the impeachment of judgments *in rem*, for want of jurisdiction in the courts which rendered them, are considered in the chapter on foreign judgments. The question has arisen more frequently in cases of judgments pronounced in foreign jurisdictions; and as foreign judgments *in rem* are held entitled to equal conclusiveness with those of the domestic courts, — a fact further noticed in its proper connection, — the principles relating to impeaching the jurisdiction must be substantially the same in both cases.

Whether a judgment *in rem* may be attacked for fraud, the only other ground for impeachment mentioned is a question which is common to judgments *in personam*, and will be fully considered in the next chapter.

[1] Outram *v.* Morewood, 3 East, 346, 357; Hancock *v.* Welsh, 1 Stark. 347; Strutt *v.* Bovingdon, 5 Esp. 56; Kinnersley *v.* Orpe, 2 Doug. 517. This case has been criticised. See Case *v.* Reeve, 14 Johns. 79; Outram *v.* Morewood, *supra*; Simpson *v.* Pickering, 1 Cromp. M. & R. 529, note; 2 Taylor, Ev. § 1499.

[2] Toby *v.* Brown, 6 Eng. 308.

[3] The Griefswald, Swab. 430.

CHAPTER V.

FOREIGN JUDGMENTS IN REM.

We come now to the consideration of the interesting division, Foreign Judgments; under which general term we include the judgments of foreign countries, of English colonies, and of the sister American States. We shall reverse the order adopted in the consideration of the judgments of the domestic courts, and enter first into an examination of the cases relating to foreign judgments *in rem*, and then of those upon the other and more extensive division.

The same reason has prevailed for the order mentioned which led to the order adopted in the preceding chapters, namely, the fact that, in an historical point of view, the division first presented in each case first appeared in the conclusive character of an estoppel. It is quite probable that, merely as adjudications, judgments *in personam* appeared first in both cases; but as conclusive evidence, it was otherwise in the case of foreign judgments, as will presently be seen.

First, then, as to foreign judgments *in rem*. Such judgments have from early times been received with great respect both in the courts of England and in those of America, in strong contrast, in many instances, to the consideration shown to foreign judgments *in personam*. As long ago as in 1781, Lord Mansfield declared that the sentence of condemnation of a vessel, by a French Court of Admiralty, was conclusive, if the court had jurisdiction, and could not be collaterally impeached; that it could only be called in question by a proceeding in appeal;[1] or, he might have added, by a direct proceeding instituted for the purpose of setting it aside. Only three years before this the same eminent commercial lawyer had said that a judgment *in personam* of a court sitting in an English colony was but *prima facie* evidence of debt, and liable to impeachment in England, in a suit upon the same.[2]

Let us now seek the precise meaning and limits of the rule thus stated, in general terms, by Lord Mansfield.

[1] Bernardi *v.* Motteux, 2 Doug. 574. [2] Walker *v.* Witter, 1 Doug. 1.

Among the most familiar illustrations of the subject are the adjudications of foreign courts of admiralty in matters of prize; and Hughes *v.* Cornelius[1] is the leading case on the subject. It was an action of trover for a ship and goods. Upon a special verdict it was found that the owner of the ship in question, and the master, were denizens of England, and that the mate and nearly all the crew were Englishmen; that the vessel was taken during a war between France and Holland, and condemned as a *Dutch* prize in a French Court of Admiralty, and sold to the plaintiff Hughes under the sentence; that on the arrival of the vessel in England the defendant Cornelius and others, the servants of the former master, took and converted her to their own use. Upon the production of the sentence of the Admiralty, the court refused to allow the verdict to be argued, but ordered judgment to be entered for the plaintiff; for it was said, the sentence of a court of admiralty ought to bind generally, according to the law of nations, notwithstanding the fact that the verdict had falsified the sentence in respect to the nationality of the vessel. The language of the court was, that "as we are to take notice of a sentence of the Admiralty here, so ought we of those abroad, in other nations; and we must not let them at large again, for otherwise the merchants would be in a pleasant condition. For suppose a decree here in the Exchequer, and the goods happen to be carried into another nation, should the courts abroad unravel this? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council; it being a matter of government, he will recommend it to his liege ambassador if he see cause; and if not remedied, he may grant letters of marque and reprisal."

It is often said that the courts of England in adopting the rule in Hughes *v.* Cornelius, and the courts of America in following the same, have been actuated by large motives of comity. But it is apparent from the language of the court above quoted, that the real motive to the adoption of the rule was one of *policy*, arising from a fear that any other rule would work disaster to English commerce, rather than from any high respect for foreign adjudications in themselves considered. And we shall find, as we proceed, that the prime motive leading to the conclusive effect given to foreign judg-

[1] 2 Show. 232; S. C. Carth. 32; Skin. 59; 2 Ld. Raym. 893, 935; T. Raym. 473.

ments has always sprung from policy, or from the great difficulty of pursuing any other course; and that international comity has in fact played a very insignificant part in the matter.[1] It may be said with some propriety that it is through comity that the courts of one country allow parties to sue upon judgments rendered in another; but the *effect* given to such judgments will be found to depend on other considerations, in no small degree.

But the rule is a most salutary one, and has been implicitly followed. It is to be noticed that the only point decided in the case of Hughes *v.* Cornelius was respecting the change of property.

And this conclusive effect of the judgments of foreign tribunals, proceeding *in rem*, has been extended to cases of capture and sale in Algiers.[2] The case cited was of a British ship, which had been captured by an Algerine corsair, and sold by the Dey of Algiers to a merchant of Minorca, and by him sold to the present holder. Upon the arrival of the ship in English waters, a warrant was applied for, by the former owner, to arrest the ship; but the court, refusing the warrant, directed a monition to issue, calling upon the possessor to show cause why the ship should not be restored to the former owner. It was contended in his behalf that the seizure by the Algerine corsair was not a lawful capture, so as to convert the property.

Sir W. Scott, in delivering judgment, said: "This ship appears to have been taken by the Algerines, and it is argued that the Algerines are to be considered in this act as pirates, and that no legal conversion of property can be derived from their piratical seizure. Certain it is, that the African States were so considered many years ago; but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relation of legal states. So long ago as the time of Charles 2, Molloy speaks of them in language

[1] See Godard *v.* Gray, Law R. 6 Q. B. 139, 152 (1870); Bank of Australasia *v.* Nias, 16 Q. B. 717. It surely cannot be from motives of comity that the courts of England enforce the judgments of French courts, when the latter refuse to do likewise with the judgments of English courts. See Godard *v.* Gray, Law R. 6 Q. B. 139, 148, where it said that foreign judgments are enforced in England upon the principle thus stated by Parke, B., in Williams *v.* Jones, 13 Mees. & W. 628, 633: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced."

[2] The Helena, 4 Ch. Rob. 3.

which, though sufficiently quaint, expresses the true character in which they were considered in his time."

He then quotes Molloy as follows: "Pirates that have reduced themselves into a government or state, as those of Algier, Sally, Tripoli, Tunis, and the like, some do conceive ought not to obtain the rights or solemnities of war, as other towns or places; for though they acknowledge the supremacy of the Port, yet all the powers of it cannot improve on them more than their own wills voluntarily consent to. The famous Carthage, having yielded to the victorious Scipio, did in some respect continue, and began to raise up her drooping towers, till the knowing Cato gave council for the total extirpation; out of the ruins of which arose Tunis, the revenging ghost of that famous city, and now what open hostility denied, by thieving and piracy continues; as stinking elders spring from those places where noble oaks have been felled; and in their art are become such masters, and to that degree, as to disturb the mightiest nations on the western empire; and though the same is small in bigness, yet it is great in mischief; the consideration of which put fire into the breast of the aged Louis 9, to burn up this nest of wasps, who having equipt out a fleet in his way for Palestine, resolved to besiege it; whereupon a council of war being called, the question was, whether the same should be summoned, and carried, it should not; for it was not fit the solemn ceremonies of war should be lavished away on a company of thieves and pirates. Notwithstanding this, Tunis and Tripoli, and their sister Algier, do at this day (though nests of pirates) obtain the right of legation. So that now (though indeed pirates), yet having acquired the reputation of a government, they cannot properly be esteemed pirates, but enemies." [1]

Sir William then proceeds: "Although their notions of justice, to be observed between nations, differ from those which we entertain, we do not, on that account, venture to call in question their public acts. As to the *mode* of confiscation which has taken place on this vessel, whether by formal sentence or not, we must presume it was regularly done *in their way* and according to the established custom of that part of the world. That the act of capture and condemnation was not a mere private act of depredation is evident from this circumstance, that the Dey himself appears to have been the owner of the capturing vessel; at least he intervenes to guaran-

[1] Molloy, p. 33, § 4.

tee the transfer of the ship in question to the Spanish purchaser. There might perhaps be cause of confiscation, according to their notions, for some infringement of the regulations of treaty; as it is by the law of treaty only that these nations hold themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations but that which is derived from positive compact and convention. Had there been any demand for justice in that country, on the part of the owners, and the Dey had refused to hear their complaints, there might perhaps have been something more like a reasonable ground to induce this court to look into the transaction, but no such application appears to have been made. The Dey intervened in the transaction, as legalizing the act. The transfer appears besides to have been passed in a solemn manner before the public officer of the Spanish government, the Spanish consul; and in the subsequent instance, the property is again transferred to the present possessor, under the public sanction of the judge of the Vice-Admiralty Court of Minorca." [1]

Sales of wrecks and derelicts, under municipal regulations, seem proper to be embraced in the class of proceedings under consideration.

In the case of Grant *v.* McLachlin,[2] an American vessel was captured by a French privateer and carried into a Spanish port; but it appeared that the Spanish authorities refused to take any steps for the condemnation of the vessel. It was subsequently put in requisition by the French government, sent to Baracoa, in Spain, and there dismantled and abandoned. The defendant purchased the wreck some six months later, under a sale by the Spanish commissary at Baracoa, raised and repaired it, and took the ship to New York, when the original owner brought the present action of trover to recover it. The court held that as the vessel had been abandoned as a wreck, and as it had been sold according to the laws of Spain, the property was transferred to the purchaser, and his title became good against the world. Mr. Justice

[1] But in the case of a vessel seized and confiscated in Mexico, by the record of the proceedings of which it appeared that there was no suitable allegation of an offence, in the nature of a libel, and that there was no statement of facts, *ex directo*, upon which the sentence professed to be founded, it was held that the sentence was not conclusive of the cause of seizure and condemnation. Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600; Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291.

[2] 4 Johns. 34.

Thompson said that the capture was no doubt illegal, and that as the captors had not obtained any judicial condemnation, the plaintiffs' title was not lost by the piratical proceedings, thus far. But the subsequent proceedings, he said, were fair, and according to law; and whether the property had been previously acquired by piracy or not, he did not deem material. "Goods taken from pirates," he continued, "and belonging to others, will, under the English law, be taken and sold by government, if the owner comes not within a reasonable time to vindicate his property. What that reasonable time shall be, every government will determine for itself. A sale, according to the law of the place where the property is, must vest a title in the purchaser which all foreign courts are bound, not only from comity, but on strong grounds of public utility, to recognize. . . . . This is not a case of prize, or title founded on capture. Such cases are governed by different rules, and must be tested by the law of nations. The sale in this case was a proceeding under a municipal regulation, and every government prescribes its own rules relative to wrecks, and property left derelict. By the English law, vessels cast on shore and abandoned, and not reclaimed within a year, are to be sold by a public officer, and the proceeds placed in the hands of the government. We have a similar statute in this State; and I believe it was never doubted but that the purchaser would obtain a valid title, which would be everywhere respected."[1]

But the condemnations of foreign admiralty courts are also conclusive of the fact for which the property was condemned, or, to speak with more precision, of the fact which was the cause of the condemnation.

The leading American case of Croudson *v.* Leonard[2] affords a good illustration of this rule. It was held in that case that the sentence of condemnation of a foreign court of admiralty, for breach of blockade, was conclusive, not merely of the change of property, but also of the breach. It was an action upon a policy of insurance containing a warranty that the vessel was neutral property, and therefore bound to conduct not inconsistent with neutrality.[3]

Mr. Justice Washington stated it to be the well-established law, both of this country and of England, that the sentence of a foreign court of competent jurisdiction, condemning property on the

[1] See The Tilton, 5 Mason, 465.

[2] 4 Cranch, 434.

[3] See also Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600; Peters *v.* Warren Ins. Co., 3 Sum. 389; Baxter *v.* New Eng. M. Ins. Co., 6 Mass. 277.

ground that it was not neutral, is so conclusive of the breach of neutrality, that it can never be controverted in any other court of concurrent jurisdiction.

"All the world," he said, "are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property."

Remarking on the case of Hughes *v.* Cornelius, already cited, he said: "The authority of the case of Hughes *v.* Cornelius, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and the insured is denied. It is true that in that case the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

"The case, so far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy property. Can the parties to that sentence be bound by so much of it as works a loss of the property, ... and yet be left free to litigate anew, in some other form, the very point decided, from which this consequence flowed?"

The courts of England have from an early period adopted this extension of the rule in Hughes *v.* Cornelius, with the qualifica-

tion that the record should show clearly the ground of the condemnation.[1] And the rule is so held with much unanimity in America;[2] but in New York the doctrine of the Court of Errors is, that the sentence of a foreign court of admiralty, condemning property as good and lawful prize, is conclusive, indeed, to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and that these matters may be disproved in a collateral action.[3]

It is furthermore immaterial that the sentence of condemnation was erroneous, or made under a decree subversive of the law of nations, — one, for instance, like the Milan decree, which had been repudiated by the United States government. An erroneous judgment is binding in collateral actions, though the error is apparent from the record. Advantage of the error can only be taken in an appellate court.[4] But if the decree was contrary to the natural principles of justice, it will be held void, as we shall see.

In the case of Imrie *v.* Castrique, just cited, there had been an adjudication in a French Admiralty Court against an English ship, in regard to matters as to which the English law should have governed, and which, if properly applied, would have resulted in a different decree. The English law was laid before the French court; and the counsel who sought to impeach the decree contended that the law of England had been contemptuously thrown aside by the court in France. Upon this point, Cockburn, C. J., said: "It is alleged that the French courts have shown a contemptuous disregard of the law of England, the only law applicable to the case, first, in holding that upon the mere contract of the master for necessaries, a charge upon the vessel follows by operation of law; secondly, in holding that no transfer of a vessel could take place while the ship was on her voyage, to the prejudice of

[1] Lothian *v.* Henderson, 3 Bos. & P. 499; Baring *v.* Clagett, Ib. 201; Fernandez *v.* Da Costa, Park, Ins. 170; Bernardi *v.* Motteux, 2 Doug. 574; Bolton *v.* Gladstone, 5 East, 155; Hobbs *v.* Henning, 17 Com. B. N. S. 791; Dalgleish *v.* Hodgson, 7 Bing. 495.

[2] See Croudson *v.* Leonard, 4 Cranch, 434; Dempsey *v.* Ins. Co. of Penn., 1 Binn. 299, note; Baxter *v.* New England Ins. Co., 6 Mass. 277; Stewart *v.* Warner, 1 Day, 142.

[3] Ocean Ins. Co. *v.* Francis, 2 Wend. 64; S. C. 6 Cow. 404; Radcliff *v.* United States Ins. Co., 9 Johns. 277; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; Smith *v.* Williams, 2 Caines Cas. 110, 118.

[4] Williams *v.* Armroyd, 7 Cranch, 423; Imrie *v.* Castrique, 8 Com. B. N. S. 405. Affirmed Law R. 4 H. L. 414; Castrique *v.* Behrens, 30 L. J. Q. B. 163.

creditors, or without such transfer appearing on the ship's papers; — propositions which, though in accordance with the French law, are wholly incorrect with reference to the law of this country.

"With regard to the first of these objections, it is to be observed that the point was never raised at all before the civil tribunal of Havre, under the decree of which court the sale of the vessel took place. The plaintiff, Castrique, so far as we can gather from the account of the proceedings contained in the special case, confined himself to the production of his bill of sale, conceiving that that alone was sufficient to establish his right to the ship. The distinction between the French law and our own, as to the hypothecation of a ship by the act of the master, does not appear to have been at all adverted to. It cannot therefore be said that the court in this particular intentionally disregarded the law of this country.

"Upon the other point there was, no doubt, an express decision, and one inconsistent with the English law. But it does not at all appear that the court set aside the law of England as inapplicable; it simply misconceived it. The law of England, put forward by French advocates, was probably expounded in a very imperfect manner, and without the production of authority to support a position which to French judges would probably seem untenable. The court therefore too hastily concluded that the law of England must be what, according to their view, the law of every mercantile community ought to be. But in deciding that the transfer of property in the ship could not be made during the absence of the ship on a voyage, so as to affect the right of third parties, and that the transfer was invalid because it was not indorsed on the certificate of registry, the court professed to be acting on the law of England, not to be setting up the law of France as overriding it. All that can be said, therefore, is, that they have misconceived the English law, and that the judgment was erroneous. But the result of the authorities on this subject clearly establishes that a judgment *in rem* of a foreign tribunal, turning on a question of English law, cannot, though erroneous, be questioned by a court in this country, any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter." [1]

[1] See Cammell v. Sewell, 5 Hurl. & N. 728; Simpson v. Togo, 1 Hem. & M. 195; S. C. 9 Jur. N. S. 403; Lang v. Holbrook, Crabbe, 179.

A leading American case [1] may at first seem in conflict with the rule in the class of cases to which Imrie *v.* Castrique, above referred to, belongs, to wit, that it is no ground of impeaching a foreign judgment *in rem*, in a collateral action, that it was decided upon an erroneous view of the law.

In the American case alluded to, the effect of a judgment in an English Vice-Admiralty Court was under consideration, in which an American ship had been condemned for breach of blockade. The Supreme Court of the United States said, *arguendo*, in an action upon an insurance policy, that the facts did not amount to a cause of condemnation, and therefore that there was no breach of the warranty of neutrality. The real question in the case was, had there been a breach of the warranty that the vessel was American? and the court, in determining this question, proceeded to inquire whether, upon any sound view of the law, there had been a breach of blockade. Having determined that the facts stated in the sentence were not sufficient to establish such breach, the point really in controversy was then of course decided, that the sentence could not be conclusive of a breach of neutrality. The conflict is therefore only apparent. Had the suit been trover to recover the vessel, or some other action in which the question to be decided would have been whether the vessel had broken the blockade, the sentence must have been conclusive of the matter; for Marshall, C. J., in delivering the opinion, refers to a case as already argued in which that point was precisely involved, and in which the court declared in favor of the conclusiveness of the sentence.[2] The proximity of the two cases, and the subsequent decisions of the court, show clearly that, had the action been trover between the immediate parties, the sentence must have been held an estoppel.

But even had the sentence proceeded upon a correct view of the laws of blockade, it is difficult to see how it could have been conclusive of the nationality of the vessel, — a point immaterial to the decree in ordinary cases of the kind. We shall examine this point with some care presently.[3]

Foreign decrees confirming marriage, or granting divorce, when pronounced by courts of competent jurisdiction, are also conclusive against the world. Lord Hardwicke, in speaking of a sentence

[1] Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185. See also Lang *v.* Holbrook, Crabbe, 179.

[2] Croudson *v.* Leonard, 4 Cranch, 434.

[3] See pp. 175–178.

relating to marriage, which it had been urged was valid by reason of having been established by a court in France, is reported to have said: "And it is true that if so it is conclusive, whether in a foreign court or not, from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain." [1]

But this doctrine, though "firmly held," to use the language of Mr. Justice Story,[2] in America and Scotland, has not been fully accepted in the courts of England. In the case of Sinclair *v.* Sinclair,[3] the validity of a sentence of divorce, pronounced in a foreign country, was alleged in bar of proceedings in the Ecclesiastical Court. Lord Stowell said: "Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper court, for adultery, would be entitled to credit and attention in this court. But I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country. But I am not prepared to say that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England." [4]

Without pursuing this subject into detail, we quote the language of Mr. Justice Story as to the result of the English doctrine. "The English courts," he says, "seem not to be disposed to admit that any valid sentence of divorce can be pronounced, in any foreign country, which shall amount to the dissolution of a mar-

[1] Roach *v.* Garvan, 1 Ves. Sr. 158. See case cited in Boucher *v.* Lawson, Cas. Temp. Hardw. 85, 89; Kennedy *v.* Cassilis, 2 Swanst. 326, note.

[2] Conf. of Laws, § 597.

[3] 1 Hagg. Con. 294.

[4] See also Scrimshire *v.* Scrimshire, 2 Hagg. Con. 395; Connelly *v.* Connelly, 2 Eng. L. & E. 570.

riage, celebrated in England, between English subjects, at least so far as such a divorce is to have any force or operation in England. At the same time it may be remarked that the doctrine, so apparently held, has undergone very elaborate discussions at a very recent period; and the grounds upon which it rests have been greatly shaken."[1]

It is also established, both in America and in England, that the sentences and decrees of the Probate and Ecclesiastical Courts, within their jurisdiction, upon the probate of wills, and the issuance of letters testamentary and of administration, are absolutely unimpeachable in all other courts, both in law and equity.[2] It cannot therefore be shown that another person was appointed executor, or that the testator was insane, or that the will was a forgery.[3]

The above cases are sufficient to show that the sentences or decrees of foreign courts of competent jurisdiction, proceeding *in rem*, are conclusive against all persons of the merits of the questions in issue, so far as they clearly appear to have been tried, and this too though they be plainly erroneous.[4]

But these judgments are liable to impeachment at several points which do not touch the merits of the action. In a leading American case[5] it is held that an adjudication of a foreign court is conclusive only of matters without which the judgment could not have been pronounced.

[1] Warrender *v.* Warrender, 9 Bligh, 89; S. C. 2 Clark & F. 488. Story, Conf. of L. § 595. See also Ib. §§ 215-230, and cases considered.

The subject has recently been before the House of Lords in two cases, and the doctrine reaffirmed, upon great consideration, substantially as above stated. Dolphin *v.* Robins, 7 H. L. Cas. 390 (1859). Shaw *v.* Gould, Law R. 3 H. L. 55 (1868).

As to the requisites to the jurisdiction of the courts of one State to pronounce a decree of divorce between parties married in another State, see Kerr *v.* Kerr, 41 N. Y. 272 (1869).

[2] Per Milligan, J., in Williams *v.* Saunders, 5 Cold. 60; Tompkins *v.* Tompkins, 1 Story, 547.

[3] Ib. See also Smith *v.* Fenner, 1 Gall. 171; Spencer *v.* Spencer, Ib. 623; Bogardus *v.* Clarke, 1 Ed. Ch. 266; Dublin *v.* Chadbourne, 16 Mass. 433, 441; Laughton *v.* Atkins, 1 Pick. 535; Crusoe *v.* Butler, 36 Miss. 150; Townsend *v.* Moore, 8 Jones, 147; Clark *v.* Dew, 1 Russ. & M. 103; Montgomery *v.* Clark, 2 Atk. 378; Allen *v.* Dundas, 3 Term, 125; Jolliffe, *ex parte*, 8 Beav. 168; Archer *v.* Mosse, 2 Vern. 8; Nelson *v.* Oldfield, Ib. 76; Plume *v.* Beale, 1 P. W. 388.

[4] See also Monroe *v.* Douglas, 4 Sandf. Ch. 126; Denison *v.* Hyde, 6 Conn. 508; Townsend *v.* Moore, 8 Jones, 147; Calvert *v.* Bovill, 7 Term, 523; Christie *v.* Secretan, 8 Term, 192.

[5] Maley *v.* Shattuck, 3 Cranch, 458. See also The Charming Betsy, 2 Cranch, 64.

In the case cited, Shattuck filed a libel on the instance side of the District Court of the United States, alleging that Maley, while in command of a public armed vessel of the United States, took possession of a schooner and cargo, in violation of the law of nations, belonging to the libellant, a Danish subject; that he put on board a prize crew, who carried the vessel to parts unknown; and that they had not brought the same to adjudication in any court of admiralty. The libel then prayed for monition to proceed to adjudication, or in default thereof for restitution in value, with damages. Maley admitted the seizure, but justified it on the ground that there was probable cause, in that the vessel was violating an act to suspend commercial intercourse between the United States and France. He also alleged that, after the seizure, the vessel and cargo were captured by a British war vessel, carried to Jamaica, and libelled and condemned in the Vice-Admiralty Court there as French or Spanish property. Maley relied on this decree as establishing the fact conclusively that the vessel and cargo were not Danish property.

The Supreme Court of the United States held that the sentence of condemnation of a vessel as enemy property was not conclusive of its nationality; it being entirely consistent with such sentence that the vessel was in fact the property of a neutral. The nationality of the vessel, the court maintained, was not a matter essential to the adjudication; and there was no estoppel to show the real fact. Marshall, C. J., in delivering the opinion, said: "It is well known that a vessel libelled as enemy's property is condemned as prize, if she act in such a manner as to forfeit the protection to which she is entitled by her neutral character. If, for example, a search be resisted, or an attempt be made to enter a blockaded port, the laws of war, as exercised by belligerents, authorize a condemnation as enemy's property, however clearly it may be proved that the vessel is in truth the vessel of a friend. Of consequence, this sentence, being only conclusive as to its own correctness, leaves the fact of real title open to investigation." By the expression "conclusive as to its own correctness," the learned judge undoubtedly meant, conclusive that there had been a breach of blockade, or that search had been resisted, to use the examples given by him. And we must here carefully note the distinction between this class of cases and that represented by Croudson *v.* Leonard, already referred to; in which, it will be remembered, it was held that a

sentence of condemnation was conclusive of the fact upon which it proceeded, — in that case the breach of blockade. The class of cases of which Maley *v.* Shattuck is a representative decide, not that the sentence is inconclusive of the fact upon which it proceeded, — not, for example, that the sentence may be falsified as to the breach of blockade, or the resistance to search, — but that the sentence shall not work an estoppel as to a matter not an essential element to the adjudication; as, for example, the nationality of the vessel. The matter of the breach of blockade, or of the resistance to search, or in general of breach of neutrality, is vital to the sentence of condemnation; such a sentence could not have been declared without proof of such facts. But it is not necessary to the sentence that the vessel in point of fact belonged to the nation with which the captor is at war; it is merely a conclusion or an inference of international law, that a ship which is seeking to break a blockade, to use the most familiar example, belongs to the enemy. It is indeed in one sense enemy property, in this, that it is an act of hostility to attempt to break a blockade, so far as the particular vessel is concerned. That vessel has arrayed itself in hostility, or as an enemy to the blockading force; and in this sense it is properly condemned as enemy property. In this sense of the term, the matter is conclusive, and cannot be disputed; for in its essence the sentence simply means that there has been a breach of blockade. It makes no difference what flag the vessel sails under, even though its colors are those of a nation in close alliance with that of the captor; by attempting to break a blockade established by its friend, the vessel becomes an enemy, and liable, by the laws of nations, to capture and condemnation as prize of war. It must be quite clear then that the sentence cannot ordinarily be conclusive as to the vessel's nationality, so as to prove, beyond contradiction, that there has been a breach of warranty that the vessel belonged to a neutral power. In a word, the sentence is conclusive of the breach of neutrality, but not conclusive of the vessel's nationality.[1]

This supposes that the condemnation did not specifically find that the vessel seized belonged to the country at war with the captor, but merely that it was, in law, enemy property. If the

[1] Bernardi *v.* Motteux, 2 Doug. 574; Calvert *v.* Bovill, 7 Term, 523; Christie *v.* Secretan, 8 Term, 192; Russel *v.* Union Ins. Co., 4 Dall. 421; S. C. 1 Wash. C. C. 409; Lambert *v.* Smith, 1 Cranch, C. C. 361; Fitzsimmons *v.* Newport Ins. Co., 4 Cranch, 185.

sentence should clearly show a finding of the precise fact that the vessel or property belonged to *the* enemy, it has been suggested that it would be conclusive of the question, though the fact might not be altogether essential to the adjudication.[1]

If we analyze the rule that the sentence is conclusive only of matters essential to it, or rather if we trace the rule back to its origin, we shall find that the reason on which it is based is that those things which are essential are in all probability examined more carefully than non-essentials; that while the former must of necessity be considered and weighed, there generally is no need to weigh and examine the latter. There has been a solemn adjudication upon the former; the matter has been carefully presented to the court, and the court, in theory at least, has examined the subject with deliberation, and passed upon the same; while the latter may perhaps have been unnoticed. But it is possible the court may, from extreme caution, or from doubt as to the nature of an incidental matter, or from an idea that it is in fact an essential element to the determination, consider and examine it with the same care and thoroughness (and so may counsel, for the same reasons) as if it were necessary to the adjudication. In such case, where these facts appear plainly from the transcript, it may not be inconsistent with legal principles to hold the adjudication conclusive. But there must be no obscurity or doubt as to whether the court actually passed and adjudicated upon the point;[2] and the doctrine in any event must be taken and applied with caution.

This suggests the further qualification of the rule of conclusiveness, that foreign judgments *in rem* are not an estoppel as to matters stated obscurely, or inferentially, or with any ambiguity.

Upon this point Mr. Justice Story remarks:[3] "I do not understand that, in construing a foreign sentence, which is to be held conclusive *in rem* as to the facts and grounds of the sentence stated therein, this court is bound to make out such facts and grounds by argument and inference and conjecture. The facts and grounds ought to appear *ex directo*, in order to estop the parties in interest from denying or questioning them. I agree with the doctrine of Lord Ellenborough, in Fisher *v.* Ogle,[4] that

[1] Bernardi *v.* Motteux, 2 Doug. 574.

[2] Bernardi *v.* Motteux, 2 Doug. 574, 581.

[3] Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600.

[4] 1 Camp. 418.

courts of justice are not bound to fish out a meaning, when sentences of this sort are produced before them. Whatever points the sentence professes *ex directo* to decide, they are bound to respect, and admit to be conclusive. But if the sentence be ambiguous, or indeterminate, as to the facts on which it proceeds, or as to the direct ground of condemnation, the sentence ought not to be held conclusive, or the courts of other countries put to the task of picking out the threads of argument, or of reasoning or recital, in order to weave them together, so as to give force or consistency or validity to the sentence."

In the case in which this language was used, the record of proceedings contained no allegation of an offence, in the nature of a libel (the judgment having been in admiralty); and for this reason the court held that the sentence was not an estoppel.

The question in the case of Christie *v.* Secretan,[1] an action upon a policy of insurance on a vessel captured and condemned as a prize, as enemy property, was one of this sort. The defence was that the ship was lost by the negligence of the owner in not having on board the *roll d'equipage*, and that she was condemned on this ground. Mr. Justice Grose said that it was indeed necessary that the ship should have such papers, to hold the insurer liable; and that if the ship had been condemned for the want of such papers, it would have been conclusive against the owner. As to the sentence of condemnation, he said that they could only look at the ground of it, and not at any of the previous reasons stated. The express ground was that the ship belonged to the enemies of France, and that did not negative any fact or circumstance that the plaintiff was bound to prove, in order to maintain his action.[2]

The concluding portion of the French sentence was to this effect: The tribunal "likewise adjudges and declares the validity of the prize of the goods and effects, whereof the lading and cargo of the said ship Mercury consists; and all that for want of the despatches and sea-papers of the said captain being in regular order; on which account she is looked upon as belonging to the enemies of the French Republic."

In Robinson *v.* Jones,[3] the record of the sentence was ambiguous. It declared that the court "pronounced the said vessel

[1] 8 Term, 192.

[2] See Calvert *v.* Bovill, 7 Term, 523.

[3] 8 Mass. 536.

called the Franklin, and her lading, to have been unlawfully rescued and retaken by the master from the possession of the prize-master and others put on board thereof from his Majesty's sloop-of-war . . . . whilst proceeding to a British port for adjudication, and as such, *or otherwise*, subject and liable to confiscation." The ambiguity lay in the words in italics; and these words destroyed the sentence as an estoppel. Mr. Chief Justice Parsons distinguishes this case from that of Baxter *v.* New England Marine Insurance Company.[1] He said that the decree in that case, "after having expressly and distinctly alleged that the vessel had violated a blockade *de facto*, by egress, proceeds to allege that for that, *and other sufficient causes*, she was condemned. Here was not only a direct assertion that a blockade had been violated, but also that the violation was a cause of the condemnation; and this being a sufficient cause by the law of nations, it was immaterial whether any other causes existed or not. But the present decree, after alleging a rescue, declares that for such cause, or otherwise, the vessel is liable to condemnation. Now we know no rule of construction by which it can be maintained that these words amount to a direct allegation that the rescue was even one of the final causes of the condemnation. There had been, as appears from the decree, an inquiry relative to the violation of the blockade of the West India Islands, with respect to which perhaps the judge was not fully satisfied. Admit that he was fully satisfied that a rescue had actually taken place; yet he might not hold himself obliged, under all circumstances, to condemn expressly for that cause. The natural construction of the phraseology is, that as the vessel had been rescued, she was liable to condemnation for that cause, *or* for some other cause not stated. Now this is far from being a direct unequivocal assertion that she is condemned because she has been rescued."

The reason of all this is quite clear and satisfactory. Judgments can only be conclusive of matters actually and, generally speaking, necessarily adjudicated. But how can it be known what precise matters have passed *in rem adjudicatum*, if the transcript state inferences? For these may often be drawn from matters *not* adjudicated. If the statements of the transcript are ambiguous, it is equally uncertain what points were decided. An ambiguity is generally consistent with opposing facts; how then can the tran-

[1] 6 Mass. 277.

script conclude the parties? And it is just as apparent that there can be no certainty of the grounds of the adjudication, if they are obscurely stated. In such cases it can only be conjecture as to what the judgment is conclusive; and an essential element of an estoppel is that it is founded upon a certainty.

The jurisdiction may also be called in question. In order to give a foreign judgment any force, *extra territoriam*, it must be made to appear that the court which pronounced the judgment had lawful jurisdiction over the cause, over the thing, and over the parties.[1]

This subject came under consideration in an early case in the Supreme Court of the United States.[2] In delivering the opinion of the court, Marshall, C. J., said: "The power under which it [the foreign court] acts must be looked into, and its authority to decide questions which it professes to decide must be considered. But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court also examinable? This question, in the opinion of the court, must be answered in the affirmative.

"Upon principle it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle then it would

[1] Story, Conf. of Laws, § 586. See The Flad Oyen, 1 Ch. Rob. 135; The Henrick & Maria, 4 Ch. Rob. 43; 1 Parsons, Ship. & Adm. 77, and cases cited.

[2] Rose v. Himely, 4 Cranch, 241, 269.

seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

"Passing from principle to authority, we find that in the court of England, whose decisions are particularly mentioned because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter."

If the record does not show any monition, or any hearing, or that any of the formalities of law had taken place, the judgment will not be even *prima facie* evidence.[1] And when the record is silent as to the matters which constitute jurisdiction, it will not be presumed.[2]

In the case of The Griefswald, just cited, the vessel of a British subject had been injured in Turkish waters, by collision with a Prussian ship; whereupon he applied to the British consul to request the Prussian authorities there to detain the injuring vessel for satisfaction. The master of the Prussian vessel, soon after this, applied to the Prussian legation to have a mixed court appointed to adjudicate the matter; but the British consul refused to take part in the matter, saying that he was not in a position to recognize the acts and proceedings proposed. The Prussian legation then proceeded to constitute a tribunal for trying the cause, without any participation or recognition by the English authorities, so far as it appeared from the transcript of the proceedings, and after the injured party had departed with his vessel. The case was tried without notice or appearance, and the complaint of the British subject was dismissed. In an action by him for the same injury in an English Vice-Admiralty Court, it was held that the decree just mentioned, in favor of the Prussian, was no estoppel, in the absence of proof that the court had jurisdiction by treaty, usage, or voluntary submission.

[1] Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291; Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600.

[2] Commonwealth *v.* Blood, 97 Mass. 538; The Griefswald, Swabey, 430.

It must be observed that this was a proceeding instituted in reality on behalf of the injuring party, the proper defendant in the case; and therefore the necessity of voluntary submission by the injured party, in the absence of treaty or usage. If the latter had instituted those proceedings, and carried them through with the same result, the question would have been quite a different one.

The fact that these proceedings were carried on in the way mentioned, indicates what is meant by the remarks of the court as to the absence of the British subject. Neither personal notice nor appearance is necessary to give jurisdiction *in rem* over the injuring party; but as to the proper plaintiff the court can acquire jurisdiction only by his instituting proceedings, or voluntarily submitting to proceedings instituted, as in this case, by the other party. In other words, the party under liability cannot institute proceedings to settle the matter so as to make the adjudication an estoppel, without personal notice or voluntary appearance on the part of the one entitled to the remedy; but in the case of legal proceedings by the latter, neither personal notice nor appearance is necessary, where the *res* is present.[1]

But though the jurisdiction may ordinarily be inquired into, if there has been a direct adjudication of the matter, it would seem that this should be conclusive; and it has been so decided in actions *in personam*.[2]

Nor are the parties estopped to show the want of sufficiency and authority in the foreign court;[3] at least the party who did not institute the proceedings there is not thus estopped; and this would seem also to be on the ground of want of jurisdiction. But the *prima facie* presumption is that the tribunal was a legitimate one.[4] In the case of the Flad Oyen, just cited, the English Court of Admiralty held that the authority of a French consul, sitting as a judge in admiralty, in Norway, under a French commission, would not be recognized.

[1] This work does not profess to deal with what constitutes jurisdiction; but if the reader desires to pursue the inquiry, he is referred to the following authorities: Hudson *v.* Guestier, 4 Cranch, 293; S. C. 6 Cranch, 281; The Mary, 9 Cranch, 126; The Tilton, 5 Mason, 465; Reid *v.* Darby, 10 East, 143; Hunter *v.* Prinsep, Ib. 378; 1 Parsons, Ship. & Adm. 75 – 78, and cases cited.

[2] Gunn *v.* Howell, 35 Ala. 144; Wyatt *v.* Rambo, 29 Ala. 510; Hudson *v.* Guestier, 6 Cranch, 281, 284; Grignon *v.* Astor, 2 How. 319, 340. See *ante*, p. 143.

[3] Snell *v.* Faussatt, 1 Wash. C. C. 271; The Griefswald, Swabey, 430; The Henrick & Maria, 4 Ch. Rob. 43; The Flad Oyen, 1 Ch. Rob. 135; 1 Parsons, Ship. & Adm. 77, and cases cited.

[4] Snell *v.* Faussatt, *supra*.

Fraud is another ground upon which a foreign judgment *in rem* may be impeached collaterally; though an important distinction is to be noticed here. It cannot be shown in another court that a will, for instance, was obtained by fraud, though it may be proved that the probate was fraudulently declared.[1] And it is probably a general principle that fraud as a ground of impeachment must be alleged of the procuring of the judgment, and not of the subject-matter in issue. For instance, a party would be permitted to show that a foreign judgment of prize had been entered up by fraud and connivance; but he would not be permitted to allege that the vessel was taken and brought into the court of condemnation by collusion and fraud. This would be to open the merits of the adjudication.

[1] Gingell *v.* Horne, 9 Sim. 539; Barnesly *v.* Powel, 1 Ves. Sr. 119, 284, 287; Meadows *v.* Duchess of Kingston, Amb. 762; Gaines *v.* Chew, 2 How. 619; Colton *v.* Ross, 2 Paige, 396; Allen *v.* Macpherson, 1 Phill. 133.

CHAPTER VI.

FOREIGN JUDGMENTS IN PERSONAM.

We proceed now to the examination of foreign judgments *in personam*. And first, of foreign judgments, strictly so called, and judgments rendered in the colonies and provinces of England. The two classes will be considered together, and generally without discrimination, for the reason that the courts have not practically distinguished between them; though grounds for a distinction have been suggested in several cases, as will be seen.

We call attention now to the cases in historical order, by which it will appear that the courts, for many years, fluctuated in their rulings concerning the effect to be given the judgments of tribunals of foreign countries: at one time considering them as of *prima facie* evidence only, and liable to be overturned by countervailing proof; now advancing and holding them conclusive of the matters adjudicated, and again receding to the former position; until finally, when the precise point presented itself for earnest consideration, they declared in favor of the conclusiveness of these judgments, on solemn deliberation. We shall see also that this point was finally settled in England considerably earlier than in America; and that some of our courts still refuse to make the advance.

One of the most familiar cases upon this subject is Walker *v.* Witter.[1] That was an action in the King's Bench, in 1778, upon a judgment rendered in the Supreme Court of Jamaica. The defendant pleaded, besides *nil debet*, *nul tiel record;* the plaintiffs having declared *prout patet per recordam*. Issue of fact was joined upon the first plea, and a verdict was given for the plaintiffs. To the plea of *nul tiel record*, the plaintiffs replied that there was such a record, which they were ready to verify by the said record. Counsel for the defendant, apparently on a motion in arrest of judgment on the verdict upon the first plea, contended that an action of debt could not be maintained on a foreign judgment; or if it could, that the consideration of the judgment should be shown. For the plaintiffs, it was argued that where

[1] 1 Doug. 1.

indebitatus assumpsit would lie, debt could be maintained, citing Crawford *v.* Whittal.[1] Counsel said that it was also determined in that case that the judgment, of itself, was *prima facie* evidence of the debt, and that therefore the plaintiffs were not bound to allege the consideration. The question whether the other plea were good was also argued by both sides.

Lord Mansfield said that the plea of *nul tiel record* was improper; and that though the plaintiffs had called the judgment a record, it was clear that they did not mean that sort of record to which implicit faith was given by the courts of Westminster Hall. The question, he then said, was brought to a narrow point, for it was admitted, on the part of the defendant, that *indebitatus assumpsit* would have lain, and, on the part of the plaintiffs, that the judgment was only *prima facie* evidence. This being the case, debt was a proper action. He thus decided the only points in the case; but he then added, in a *dictum*, that though foreign judgments were good grounds of action, still they were examinable on the merits; and among other cases, he referred to one in which he said Lord Hardwicke had thought himself entitled to examine into the justice of a decision of the House of Lords, because the original decree was rendered in a court in Wales.[2]

The other judges agreed with Lord Mansfield. It will be observed, however, that the question was not raised in the case whether foreign judgments were conclusive; the plaintiffs only insisting that they were *prima facie* evidence, as this was sufficient for their case.

In Galbraith *v.* Neville[3] the question arose (after verdict for the plaintiff) upon a rule to show cause why there should not be a new trial. Lord Kenyon there said: "I cannot help entertaining very serious doubts concerning the doctrine of Walker *v.* Witter, that foreign judgments are not binding on the parties here. But when I am told that Lord Hardwicke did not hold himself bound by a decree on the chancery side of the Court of Great Sessions in Wales, affirmed in the House of Lords, I own I am quite lost in a maze." Mr. Justice Buller, however, in the same case, approves the doctrine of Lord Mansfield in Walker *v.* Witter, and says that he has often heard that eminent jurist repeat what was said by

[1] H. 13 Geo. 3, B. R.

[2] 1 Eq. Cas. Ab. 83, pl. 3; Ifquierdo *v.* Forbes, H. 24 Geo. 3, B. R.

[3] 1 Doug. 5, note.

Lord Hardwicke in the case alluded to, and that this was the ground of his lordship's opinion: "When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong." The same view was entertained by Eyre, C. J., in Phillips *v.* Hunter.[1] "It is in one way only," he said, "that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory; not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise. We examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law."

A case before Lord Chief Justice Best, in 1826,[2] has been often cited as sustaining the doctrine that foreign judgments are conclusive; but it is not a direct authority for that position. All that his lordship held was, that such judgments were at all events *prima facie* ground of actions; and he expressly stated that it was not necessary to decide whether the judgment pronounced by the Scotch court could be impeached on the merits.

The next case which entertains the doctrine of Lord Mansfield, in Walker *v.* Witter, was decided in the House of Lords, in 1834.[3] In this case, a bill had been filed in Ireland to enforce a decree of the Court of Chancery in England; the bill was dismissed for want of jurisdiction, and of course the court of Ireland did not entertain the question of the conclusiveness of the English decree. The only point, therefore, that could be decided on the appeal to the House of Lords, was whether the court in Ireland had erred in refusing to entertain the bill. The decree was reversed; the Lord Chancellor holding, on the authority of Martin *v.* Nicholls,[4] that a foreign decree may well be the ground of a bill in another court. But

[1] 2 H. Black. 403, 411.
[2] Arnott *v.* Redfern, 3 Bing. 353.
[3] Houlditch *v.* Donegal, 8 Bligh, N. S. 301.
[4] 3 Sim. 458.

in the course of his opinion he took occasion to express his views very decidedly in favor of the doctrine that the judgments of the courts of other countries were only *prima facie* evidence of debt, and might be reopened in a suit to carry them into effect at home; and this, he contended, was eminently proper where it appeared that the law of the foreign country was inconsistent with that of England. And he cited Buchanan *v.* Rucker[1] in illustration of this point, where the court refused to enforce a foreign judgment against a party residing in England, who, upon the face of the proceedings, appeared only to have been summoned "by nailing up a copy of the declaration at the court-house door."

Don *v.* Lippman,[2] in the House of Lords, is a still later case, in which the language of Lord Brougham is much to the same effect; but the fact was that the defendant in that case was a subject of Scotland, while the judgment against him was rendered in France, and the action was begun and ended in his absence, the only citation being "by the affixing of notice in a public office," in accordance with a form known in the French courts. Lord Brougham said the case was "stronger than that of the defendant in Buchanan *v.* Rucker, and he must have the same principle applied to it." The language of the court in Douglas *v.* Forrest,[3] quoted by Lord Brougham, which was an action in an English court on a Scotch judgment of horning, against a Scotchman born, is to the same effect. "We confine our judgment," said the Chief Justice, "to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected."[4]

But these cases do not decide that the merits of a valid foreign judgment may be inquired into; they merely hold that the judgment will not be enforced if it appear that the foreign court had not acquired jurisdiction of the case. Of this more at length, in a subsequent part of this chapter.

The above are all the English cases of importance which favor the rule that the judgments of courts of other countries are inconclusive; and it will be observed that in none of them is there an express and authoritative adjudication of the point.

On the other side, among the early cases, we have the language

[1] 1 Camp. 63; S. C. 9 East, 192.
[2] 5 Clark & F. 1.
[3] 4 Bing. 686.
[4] See also Hall *v.* Odber, 11 East, 118.

of Lord Kenyon, above quoted in Galbraith *v.* Neville; of Lord Ellenborough in Tarleton *v.* Tarleton;[1] of Lord Hardwicke in Boucher *v.* Lawson;[2] and of Lord Chancellor King, in Burroughs *v.* Jamineau.[3] Gold *v.* Canham[4] also holds this doctrine; and the more recent case of Martin *v.* Nicolls[5] is a direct authority that the judgments of colonial courts cannot be questioned.

Coming down to a still later period, we find Lord Denman in two cases, one in 1839,[6] the other in 1844,[7] supporting the same side of the question. In the second case he very clearly intimated that a plea to an action upon a colonial judgment ought to steer clear of an inquiry into the merits. "For," he added, "whatever constituted a defence in that court ought to have been pleaded there."

But the doctrine was directly impugned in the recent case of Bank of Australasia *v.* Nias,[8] and the rule adjudged that a plea to the merits in a suit upon a colonial judgment, otherwise valid, was bad; and this case has settled the law of England.[9]

The action was upon a colonial judgment, and whether the same conclusiveness should be accorded to judgments rendered in foreign countries, from which no appeal lies to any English court, was not and could not have been decided. Lord Campbell expressly refrained from giving an opinion upon the point. There had never been an authoritative decision of the question prior to 1862, though many *dicta* are to be found among the cases to the effect that they are only *prima facie* ground of suit. Several of the cases have been already referred to. In that year the important case of Scott *v.* Pilkington[10] was tried, in the Court of Queen's Bench, which was an action upon a judgment rendered in New York. The distinction, however, which Lord Campbell observed between the conclusiveness of colonial and foreign judgments, — that in the former case an appeal lies to the Privy Council, — does not seem to have been presented to the court; at any rate, it was unnoticed. The court, Cockburn, C. J., said "it was not

[1] 4 Maule & S. 20.
[2] Cas. Temp. Hardw. 85, 89.
[3] Mosely, 1.
[4] 1 Cas. in Ch. 311; also reported in note to Kennedy *v.* Cassillis, 2 Swanst. 313, 325.
[5] 3 Sim. 458.
[6] Ferguson *v.* Mahon, 11 Ad. & E. 179.
[7] Henderson *v.* Henderson, 6 Q. B. 288.
[8] 16 Q. B. 717.
[9] De Cosse Brissac *v.* Rathbone, 6 Hurl. & N. 301; Scott *v.* Pilkington, 2 Best & S. 11; Vanquelin *v.* Bouard, 15 Com. B. N. S. 341.
[10] 2 Best & S. 11.

denied that since the decision in the case of The Bank of Australasia *v.* Nias we were bound to hold that a judgment of a foreign court, having jurisdiction over the subject-matter, could not be questioned on the ground that the foreign court had mistaken their own law, or had come on the evidence to an erroneous conclusion as to the facts." So that it appears that the counsel failed to call the attention of the court to the supposed distinction; and the court without hesitation gave an effect to the decision of Lord Campbell which he himself declined to give to it. The question, however, must be regarded as settled in the English courts by this case, and in a just, if not a necessary, concession of comity. The rule in the case referred to went a step further, and declared that though, as in that case, an appeal be actually pending upon the judgment of the foreign court, this should be no bar to the action in England; although it was said that it might afford ground for the equitable interposition of the English court to prevent the possible abuse of its process, and on proper terms to stay execution.[1]

The result, then, finally reached in the courts of England is that foreign judgments, strictly so called, and colonial judgments, stand in the same category and on a perfect equality, so far as the matter of conclusiveness is concerned; and in both cases every plea which goes to the merits of the action upon which the judgment was rendered is bad, provided the judgment was not otherwise subject to impeachment.[2]

The subject has again very recently come under review by the Court of Queen's Bench, but in a somewhat different form.[3] The question raised in the case cited was, whether a judgment, rendered in France upon an English contract, the record of which showed on its face that the law of England had been misapplied, was conclusive when sued upon in an English court. The court

[1] See Taylor *v.* Shew, 39 Cal. 536 (1870).

[2] See also Crawley *v.* Isaacs, 16 Law T. N. S. 529; Doglioni *v.* Crispin, Law R. 1 H. L. 301; Barber *v.* Lamb, 8 Com. B. N. S. 95; Robertson *v.* Struth, 5 Q. B. 941; Hamilton *v.* Dutch East India Co., 8 Bro. P. C. 264; Becquet *v.* MacCarthy, 2 Barn. & Ad. 951; Burrows *v.* Jemino, 2 Strange, 733; Ferguson *v.* Mahon, 11 Ad. & E. 179; Ricardo *v.* Garcino, 12 Clark & F. 368; Bank of Australasia *v.* Harding, 9 Com. B. 661; Cammell *v.* Sewell, 3 Hurl. & N. 617; S. C. in error, 5 Hurl. & N. 728; Kersall *v.* Marshall, 1 Com. B. N. S. 241; General Steam Nav. Co. *v.* Guillou, 11 Mees. & W. 877; Frayes *v.* Worms, 10 Com. B. N. S. 149; Simpson *v.* Fogo, 1 Hem. & M. 195; Obicini *v.* Bligh, 8 Bing. 335.

[3] Godard *v.* Gray, Law R. 6 Q. B. 139 (1870).

decided the question in the affirmative; taking occasion to reaffirm also the doctrine of the late cases above presented.

Mr. Justice Blackburn, who spoke for the majority, said: "It is broadly laid down by the very learned author of Smith's Leading Cases, in the original note to Doe *v.* Oliver,[1] that it is clear that if the judgment appear on the face of the proceedings to be founded on a *mistaken notion* of the English law, it would not be conclusive. For this he cites Novelli *v.* Rossi,[2] which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight, and accordingly it has been treated with respect. In Scott *v.* Pilkington,[3] the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position, and state it thus: 'If the judgment be founded on an *incorrect* view of the English law, *knowingly or perversely acted on.*' The doctrine thus qualified does not apply to the present case; and there is, therefore, no need to inquire how far it is accurate.

"But the doctrine as laid down by Mr. Smith does apply here; and we must express an opinion on it, and we think it cannot be supported, and that the defendant can no more set up, as an excuse relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country, incidentally involved, or as to any other question of fact.

"It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law, and any other mistake. No doubt the English court can, without arrogance, say that

[1] Smith, L. C. 2d ed. at p. 448.
[2] 2 Barn. & Ad. 757.
[3] 2 Best & S. 11, 42.

where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland, it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England, and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland, and not in England."

The early English *dicta*, above referred to, were for a long time quite generally, if not universally, adopted in the courts of this country; and the judgments of foreign countries, and before the adoption of the Constitution, and for a short time afterwards, in many instances, judgments rendered in the sister Colonies and States were treated as only *prima facie* evidence of debt, liable to be disproved like ordinary promises declared upon.[1] It will be seen that several of the cases cited as holding foreign judgments inconclusive are recent decisions. Only two of them, however, are direct adjudications to that effect, namely, Burnham *v.* Webster, and Rankin *v.* Godard. The other recent cases (Middlesex Bank *v.* Butman, and Taylor *v.* Barron) support the position only by *dicta;* and all of the cases cited are founded on the early English *dicta* now overruled. And in two of the cases just cited (Barney *v.* Patterson, and Taylor *v.* Phelps) it is said that when foreign judgments are only incidentally involved, they have the same conclusiveness as domestic judgments; and in Cummings *v.*

[1] Hitchcock *v.* Aicken, 1 Caines, 460; Taylor *v.* Bryden, 8 Johns. 173; Pawling *v.* Bird, 13 Johns. 192; Bartlett *v.* Knight, 1 Mass. 400; Buttrick *v.* Allen, 8 Mass. 273; Bissell *v.* Briggs, 9 Mass. 462; Winchester *v.* Evans, Cooke, 420; Glasgow *v.* Lowther, Ib. 464; Taylor *v.* Phelps, 1 Har. & G. 492; Barney *v.* Patterson, 6 Har. & J. 182; Benton *v.* Burgot, 10 Serg. & R. 240; Williams *v.* Preston, 3 J. J. Marsh. 600; Aldrich *v.* Kinney, 4 Conn. 380; Garland *v.* Tucker, 1 Bibb, 361; Pritchet *v.* Clark, 3 Har. (Del.) 517; Clark *v.* Parsons, Rice, 16; Bimeler *v.* Dawson, 4 Scam. 536; Burnham *v.* Webster, 1 Woodb. & M. 172; Middlesex Bank *v.* Butman, 29 Maine, 19; Taylor *v.* Barron, 30 N. H. 78; Rankin *v.* Godard, 54 Maine, 28.

Banks[1] it is said that all the American authorities agree in this proposition.

The books contain but few American cases in which the question of the conclusiveness of foreign judgments is directly involved and decided. In the last case cited, and in Monroe *v.* Douglas,[2] it was clearly intimated that they could not be impeached on the merits. The point arose, however, in the recent case of Lazier *v.* Westcott,[3] in the Court of Appeals of New York. In a well-considered opinion, Mr. Justice Davies, in pronouncing the judgment, adopted the late English view, holding a judgment between the same parties, in favor of the same plaintiff, as conclusive. In the concluding portion of his opinion he said: "We think the rule adopted in England . . . . should be adopted and adhered to here, in respect to such foreign judgments, and that the same principles and decisions which we have made as to judgments from the courts of other States of the Union should be applied to foreign judgments."

The court rely much on the reasoning of Mr. Justice Story,[4] which is so forcible and convincing that we cannot refrain from presenting it.

"It is indeed very difficult to perceive," he says, "what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the

[1] 2 Barb. 602.
[2] 4 Sand. Ch. 126.
[3] 26 N. Y. 146.
[4] Conf. of Laws, § 607.

judgment, and to proceed *ex æquo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial."

The language of the Court of Queen's Bench, in a case already cited,[1] is much to the same effect; and though this decision was made in regard to a colonial judgment, the very recent case of Scott *v.* Pilkington,[2] by the same court, adopted the same ruling, as has been stated, in reference to a judgment pronounced in the United States.

The question rests almost entirely upon considerations of convenience, and it is very plain that these lie in the direction of the conclusiveness of these judgments. The current of judicial opinion is also decidedly this way both in England and America; and it cannot be hazardous to predict that the rule of conclusiveness will soon be generally accepted, here as well as there. The question indeed seems more proper for legislation; but as the courts have undertaken to settle it, it is greatly to be desired that a uniform rule should be made, especially in view of the vast amount of trade now carried on between the different nations and countries, and the rapidly increasing litigation between subjects and foreigners. The distance between England and the United States has been practically annihilated, and trade and intercourse between the two countries are now a thousand times greater than they were between the American States at and prior to the Constitution, when it was found necessary to make a fundamental provision for the conclusiveness of judgments of the sister States. It is quite true that this provision was intended partly to cement the friendship of the States, and to prevent jealousy and discord; but these motives also call for a similar rule as to the decrees and judgments rendered in all civilized foreign countries. Indeed, every reason lying at the

[1] Bank of Australasia *v.* Nias, 16 Q. B. 717. See Ferguson *v.* Mahon, 11 Ad. & E. 179.

[2] 2 Best & S. 11.

basis of the rule as to the judgments of sister States, utility, convenience, justice, and peace, all require that such judgments should be held conclusive upon the merits, when not otherwise open to impeachment.

We proceed now to consider the second and more important branch of our subject, — judgments *in personam* of the sister States of the American Union.

Prior to the adoption of the Articles of Confederation the American Colonies, or (as they became by the Declaration of Independence) States, were considered as foreign to each other by their courts, in respect to the conclusiveness of their judgments; and the English doctrine, as it was then understood, prevailed, that such judgments were only *prima facie* evidence of debt. But the inconvenience of the rule was felt even at this early day, when the intercourse and traffic between the Colonies were comparatively quite limited. Accordingly, in at least one of the Colonies, that of Massachusetts Bay, an act was passed [1] as early as in 1773, which provided that the judgments of courts of the neighboring Colonies should be conclusive when sought to be enforced in Massachusetts, provided the courts which rendered them had jurisdiction.[2]

The fact that the act extended only to the judgments of the neighboring Colonies indicates quite plainly that it was passed rather from considerations of utility, in the interests of trade and commerce, than entirely from motives of comity; for surely, if the latter idea had prompted the legislation, it would have included at least all of the English-speaking provinces. But the fact was, there was but little intercourse and trade between the distant Colonies and those of New England, and there was no occasion to make the act general. Subsequent events, however, increased the intercourse between the Provinces, particularly the Revolution; and it became necessary to make some general provision suited to the new state of things.

To this end a provision was made in the Confederation, and in these words: "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Though the object of this clause is obvious, its language was not thought sufficiently full and clear; and it was therefore slightly changed in the final draught of the Constitution, and made to read as follows: "Full faith and

[1] Provincial Act of 14 Geo. 3, ch. 2. [2] Bissell *v.* Briggs, 9 Mass. 462.

credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[1]

Congress, in pursuance of this power, passed the act of May 26, 1790, which, after providing the manner of authentication, declared that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The first section of the supplementary act of March 27, 1804, contained a further provision relating to the attestation of records from the sister States, followed by a clause identical with the one just quoted; and the second section of the act extended these provisions over the "Territories of the United States and the countries subject to the jurisdiction of the United States."

As has been already observed, there was at an early day in the history of the United States some confusion as to the construction of this provision of the Confederation and Constitution, and of the acts passed in pursuance. Before the decision in the celebrated case of Mills *v.* Duryee[2] had been made and become known, the general current of construction was that the act of Congress had not changed the rule so generally received before that time, that the judgments of the sister Colonies and States were only *prima facie* grounds of action,[3] though this rule was by no means unanimous.[4] But the case referred to, and the contemporaneous case of Bissell *v.* Briggs, cited in the note, changed the current even in the States which had adopted the doctrine just mentioned. As the matter was one depending upon a proper construction of the Federal Constitution and of an act of Congress, deference was justly and generously yielded by the State courts to the judgment of the Supreme Court of the United States.

Mills *v.* Duryee was an action of debt upon a judgment of the

[1] Const. U. S., Art. 4, § 1.

[2] 7 Cranch, 481.

[3] Hitchcock *v.* Aicken, 1 Caines, 460; Pawling *v.* Bird, 13 Johns. 192; Winchester *v.* Evans, Cooke, 420; and other cases cited *ante*, p. 192.

[4] Noble *v.* Gold, 1 Mass. 410, note; Bissell *v.* Briggs, 9 Mass. 462; Armstrong *v.* Carson, 2 Dall. 302; Curtis *v.* Gibbs, 1 Penn. (N. J.) 399; Green *v.* Sarmiento, Peters, C. C. 74; Blount *v.* Darrach, 4 Wash. C. C. 657; Turner *v.* Waddington, 3 Wash. C. C. 126.

Supreme Court of New York, in the Circuit Court for the District of Columbia. The defendant pleaded *nil debet*, which upon general demurrer was held bad. On appeal to the Supreme Court of the United States, counsel for the plea contended that the true construction of the constitutional provision and acts of Congress confined their operation to evidence only, and did not alter the rules of pleading. The "effect" to be given to the copies of records was their effect as evidence; for it was not contended that an execution could issue there upon such a record. Counsel further argued that *nul tiel record* could not be pleaded, because there was no way of procuring and inspecting the original record. This could not be pleaded upon a copy, because that would give it greater credit than it would receive in New York.

The counsel on the other side admitted that the record was to have effect only as evidence; but it was evidence of the highest nature, namely, *record* evidence, as to which *nil debet* was a bad plea. To the argument that a copy was not of the same dignity with the original, he referred to the act of Congress as making the authenticated exemplification equivalent to the original record in its proper state, and as communicating to it the same effect as evidence, making it capable of sustaining the same averments in pleading, and of abiding the same tests as the original record. It therefore could not be denied or controverted by any plea, such as *nil debet*, which put in issue the matters averred by the record; but the defendant should have either distinctly denied the record, or avoided it by pleading satisfaction, etc.

He contended that it was immaterial that the ministerial officers of the law in the district could not issue an execution upon the authenticated record, for that objection would be equally valid against the record when used in its proper state, but out of the jurisdiction of its proper court; and also against the sentences of foreign courts of admiralty under the law of nations.

Mr. Justice Story delivered the opinion of the court, sustaining the decision below in overruling the plea. He adopted the view of the plaintiff's counsel, that the effect of the Constitution and acts of Congress was to give the authenticated exemplification the conclusiveness of the highest or record evidence; as to which the proper plea was *nul tiel record*. "Congress," he said, "have declared the *effect* of the record by declaring what faith and credit shall be given to it."

As to the defendant's second point, he said that the record might "be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection by the court of its own record, or as an exemplification would be in any other court of the same State. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, however, is undoubted, that an exemplification would in such case be decisive. The original need not be produced." To the argument that execution could not issue directly on the judgment of a sister State, he said: "This objection, if it were valid, would equally apply to every other court of the same State where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution."

In conclusion, the learned judge says: "Were the construction contended for by the plaintiff in error to prevail, that judgments of the State courts ought to be considered *prima facie* evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

It will be observed that the court base their decision of the conclusiveness of the judgment rendered in New York upon the doctrine that, under the Constitution and act of Congress, it was record evidence; and that *nil debet*, by the common-law system of pleading, was an inadmissible plea in such a case. Mr. Justice Johnson seemed to understand the court as holding that *nul tiel record* was the only plea to be pleaded to an action of this kind; and as such plea, at common law, would only put in issue the existence of the record, no inquiry could be made, under any circumstances, even into the jurisdiction of the court of the sister State. He was not in favor of so sweeping a rule. Though not opposed to holding the judgments in question conclusive of the

merits, i. e. of the subject-matter and ground of the original action, he objected to a rule which (he supposed) would preclude all inquiry into the jurisdiction. That we may be the better understood, we quote a portion of his language: "Now if in this action *nul tiel record* must *necessarily* be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting the object of the Constitution, by removing all cause for State jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits. But if the States are at liberty to pass the most absurd laws on this subject, and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the Constitution in direct hostility with the object of it. I will not undertake to decide, nor does this case require it, how far the courts of the United States would be bound to carry into effect such judgments; but I am unwilling to be precluded, by a technical nicety, from exercising our judgment at all upon such cases."

The eminent judge was not alone in thus construing the opinion of the majority of the court. Other courts of high character at first supposed that the Supreme Court of the United States had pronounced the same sweeping rule.[1] But if this was the intention, the rule has been modified by later decisions of the same court, which hold that, subject perhaps to some exceptions, soon to be noticed, there is no estoppel to deny the jurisdiction of the court which rendered the judgment sued upon.[2] It has been maintained, with great force, that the court in Mills *v.* Duryee only intended to declare that *nul tiel record* was the proper general issue, and did not mean to preclude parties from pleading special pleas to the jurisdiction.[3] But we will not further anticipate this question.

[1] Commonwealth *v.* Green, 17 Mass. 515, 546; Hall *v.* Williams, 6 Pick. 232, 243. See Carleton *v.* Bickford, 13 Gray, 591.

[2] D'Arcy *v.* Ketchum, 11 How. 165; Christmas *v.* Russell, 5 Wall. 290; Cheever *v.* Wilson, 9 Wall. 108.

[3] Shumway *v.* Stillman, 4 Cow. 292; S. C. 6 Wend. 447.

At all events the court were unanimous in the opinion that the merits of the judgment sued upon were not open to inquiry; and this is all that we care to notice at present.

Precisely the same question involved in Mills *v.* Duryee arose a few years later in Hampton *v.* McConnel,[1] in an action in South Carolina upon a judgment of the Supreme Court of New York. The same plea of *nil debet* was entered, overruled in the court below, and the decision of that court sustained by the Supreme Court of the United States; Marshall, C. J., delivering the opinion, and declaring that only such pleas could be pleaded as would be good to an action upon the judgment in the domestic courts.[2]

In a subsequent case before the same court,[3] the question arose whether, under the Constitution and act of Congress, the statute of limitations of Georgia could be pleaded to an action in that State, founded on a judgment rendered in South Carolina. It was the opinion of the court that the provisions upon the subject were intended only to preclude all inquiry into the subject-matter of the judgment; and that therefore the statute of limitations, not being a plea to merits, was an admissible plea. The learned judge who delivered the opinion[4] presents a clear exposition and history of the law, which cannot fail to be of interest. He said: "Though a judgment obtained in the court of a State is not to be regarded in the courts of her sister States as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, and by the act of May 26, 1790, § 1,[5] the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given when authenticated as the act of Congress has prescribed. It must be obvious, when the Constitution declared that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates

[1] 3 Wheat. 234.

[2] See Griffin *v.* Eaton, 27 Ill. 379, holding that if technicalities have been abolished in the sister State, they must not be used to defeat the judgment elsewhere.

[3] McElmoyle *v.* Cohen, 13 Peters, 312. See Matoon *v.* Clapp, 8 Ohio, 248.

[4] Mr. Justice Wayne.

[5] 1 Stat. at Large, 122.

to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another State. The authenticity of a judgment, and its effect, depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a State is given by the Constitution, independently of all legislation. By the law of 26th of May, 1790, the judgment is made a debt of record, not examinable upon its merits; but it does not carry with it into another State the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another State, it must be made a judgment there, and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a State court cannot be enforced out of the State by an execution issued within it. This concession admits the conclusion that . . . . judgments out of the State in which they are rendered are only evidence in a sister State that the subject-matter of the suit has become a debt of record, which cannot be avoided but by the plea of *nul tiel record*. But we need not doubt what the framers of the Constitution intended to accomplish by that section, if we reflect how unsettled the doctrine was upon the effect of foreign judgments, or the effect, *rei judicatæ*, throughout Europe, in England, and in these States, when our first Confederation was formed. On the Continent it was then, and continues to be, a vexed question, determined by each nation according to its estimate of the weight of authority to which different civilians and writers upon the laws of nations are entitled. . . . .

"In these States, when Colonies, the same uncertainty existed. When our Revolution began, and independence was declared, and the Confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the Confederacy, and the rights to be given to the citizens of each State in all the States, would produce such intimate relations between the States and persons, that the former would no longer be foreign to each other in the sense that they had been as dependent Provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different States. . . . .

"What faith and credit, then, is given in the States to the judg-

ments of their courts? They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered. In other words, as has been said by a commentator upon the Constitution: 'If a judgment is conclusive in a State where it is pronounced, it is equally conclusive everywhere in the States of the Union.'[1] It is therefore put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit."[2]

It is also held that the Constitution refers only to judgments in civil actions, and does not extend to criminal cases.[3] But a contrary view has been maintained in North Carolina, where it is held that a witness incompetent by conviction for a crime in a sister State is incompetent to testify in the courts of North Carolina.[4] Nor under the Constitution does a judgment rendered in a sister State rank as a domestic judgment in marshalling assets. It has no effect in this direction.[5] It has also been held in a late case that the courts of one State may restrain a party from proceeding to enforce a judgment obtained in another State, where the defendant had been fraudulently led to believe that the suit in the sister State had been abandoned;[6] but the doctrine is unsettled.[7]

Nor does the Constitution require any State to enforce the police regulations of another, or *qui tam* actions and the like. But when the courts of another State have taken cognizance of a matter of local police regulation, the judgment is entitled to full faith and credit throughout the Union, and will entitle the plaintiff to maintain an action thereon, though such regulations could not be enforced out of the State by an original action. And the courts of the State in which the judgment is sued upon will hold the same conclusive of the merits.[8]

[1] Story, Const. § 183.

[2] See also Green *v.* Sarmiento, Peters C. C. 74.

[3] Commonwealth *v.* Green, 17 Mass. 514.

[4] State *v.* Candler, 3 Hawks, 393.

[5] McElmoyle *v.* Cohen, 13 Peters, 312; Cameron *v.* Wurtz, 4 McCord, 278; Brengle *v.* McClellan, 7 Gill & J. 434; Harness *v.* Green, 20 Mo. 316.

[6] Engel *v.* Scheuerman, 40 Ga. 206. So Pearce *v.* Olney, 20 Conn. 544.

[7] *Post*, pp. 243 – 245.

[8] Indiana *v.* Helmer, 21 Iowa, 370; Healy *v.* Root, 11 Pick. 389.

In the case first cited for this proposition, the action was based upon a judgment rendered in another State, in accordance with a statute of that State prescribing proceedings to enforce the support of bastard children by the father. To the objection that this was a proceeding to enforce a mere police regulation of another State, the court said: "There is much truth in the legal proposition upon which this claim rests; but the error is in its application. If the mother of the bastard child, begotten and born in the State of Indiana, had come to Iowa and sought legal proceedings to compel the defendant, its father, to support it, and to give bond therefor, and otherwise comply with the requirements of the statutes of Indiana, the answer of the defendant, that the subject-matter of such action was one of merely local police regulation of Indiana, not enforceable in this State, would have been conclusive, and amounted to a complete defence.[1] Such an action can no more be sustained beyond the limits of the sovereignty within which it arose than can an action for any other penalty provided by statute of such sovereignty for the wrongful act of a defendant therein. Both are alike matters of local, internal police, and enforceable alone by the sovereignty making the regulation and providing the penalty. But where the local jurisdiction has attached, and the courts of that State or sovereignty have properly taken cognizance of the matter, and rendered judgment for such penalty, such judgment is entitled to 'full faith and credit' in every other State. . . . . And the courts of such other State will not inquire into the facts upon which it was based, nor whether the cause of action would have been enforced by them."

And it is held that the Constitution has no reference to matters subsequent to the judgment, such as issuing and returning execution thereon, and that the same faith is not due to these as to the judgments of sister States.[2]

We shall now present several important cases to illustrate more fully the conclusiveness of judgments of the sister States.

In a recent case in the Supreme Court of the United States, it appeared from the record that the plaintiff had recovered a valid judgment in Kentucky upon a promissory note, and had sued subsequently upon this judgment in Mississippi. The defendant relied upon an act of the Legislature of the latter State, whereby it was declared that no action should be maintained on any judgment

[1] Graham v. Monsergh, 22 Vt. 543. [2] Carter v. Bennett, 6 Fla. 214.

rendered without the State against a resident of the State, in any case where the cause of action would have been barred had the suit been brought in Mississippi. The case in question came within the language of this act; and the Supreme Court at Washington declared the same unconstitutional and void. "Beyond all doubt," the court observed, "the judgment was valid in Kentucky, and conclusive between the parties in all her tribunals. Such was the decision of the highest court of the State, and it was undoubtedly correct; and if so it was not competent for any State to authorize its courts to open the merits and review the case, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the State courts from which it was taken."[1]

In a late case in Maine, it appeared that the indorsee of a note had sued the maker in Massachusetts. The defendant pleaded payment and the statute of limitations, and obtained a general verdict in his favor. After this judgment the payee in some way obtained possession of the note, and brought suit against the maker in Maine. The latter pleaded the judgment rendered in Massachusetts; whereupon the plaintiff offered evidence to show that that judgment had been rendered upon the plea of the statute of limitations. The court decided the evidence inadmissible, saying that it was immaterial whether the verdict was given upon that ground or upon the plea of payment. The judgment was conclusive in Massachusetts, and must therefore be conclusive in Maine. The note had also ceased to be negotiable by the judgment, having passed into the custody of the court.[2]

In an action in the Superior Court of New York City, upon a judgment rendered in Wisconsin, the defendant alleged in his answer that the judgment was recovered upon a transaction which happened in the State of New York, and upon which, by the laws of that State, no cause of action accrued; that the plaintiff owed the defendant $350.70, for merchandise and liquors; and that the plaintiff owed him $110, upon a judgment recovered in Wisconsin. From the testimony it appeared that the plaintiff had bought the merchandise and liquors on four months' time, and that having paid all but about $100 of the amount due for the same, the present defendant sued the present plaintiff for the balance due, and recovered the judgment above mentioned. It further ap-

[1] Christmas v. Russell, 5 Wall. 290. [2] Sweet v. Brackley, 53 Maine, 346.

peared that the plaintiffs, about a month prior to this suit, brought the action which terminated in the judgment now sued upon; in which action they alleged the sale by defendant to them of the liquors and merchandise, upon "a representation and warranty," upon which the plaintiff relied, and then averred that the quality of the goods had been misrepresented, that they were poor, worthless, and of no use to the plaintiffs, whereupon the judgment in question was rendered. Defendant then moved to dismiss the complaint on the ground that the supposed cause of action was not enforceable by the laws of New York; and that the plaintiffs were precluded from recovering by reason of the judgment obtained by the defendant for the balance of the account. The court, upon the first point, ruled that though jurisdiction could only be entertained of causes of action recognized by the laws of New York, still, among these, was a judgment rendered in a sister State; and that the judgment pronounced in Wisconsin must be received as conclusive, regardless of the nature of the original cause of action, which could not now be inquired into. As to the second objection, it was held that the judgment obtained by the defendant for the balance due for the goods concluded the plaintiffs on nothing, except that they owed the price of the goods; and that this was perfectly consistent with the liability of the defendant for damages for misrepresenting their quality. The plaintiffs were not bound to recoup, but might avail themselves of the right of suing for this wrong.[1]

A case of considerable interest and importance was decided in the Supreme Court of Louisiana in 1858, involving this question of the conclusiveness of judgments rendered in the sister States. A brought suit against an estate represented by B, as administrator. The defendant, after alleging several special defences and cross-claims, prayed for judgment on the latter, and obtained it, to the amount of $3,000 and upwards. He thereupon brought the present action in Louisiana, upon the judgment in his favor as defendant in Texas. A, the former plaintiff, now defendant, set up, by way of defence, substantially the same demands as those for which he had brought his action in Texas. He averred in his answer that he was not in any manner indebted to the said estate; that if he had been advised that such demands would be made, he could and would have proved that they were totally unfounded; and that the

[1] Phillips *v.* Godfrey, 7 Bosw. 150. See *ante*, pp. 103 – 112.

attorney whom he had employed to attend to the case was sick and confined to his bed at the time the trial was had. At the present trial he offered to prove that subsequent to the time when it was averred that he was indebted to B's intestate, the latter had stated that he, A, owed him, B's intestate, nothing, but that he, the latter, would be owing A the avails of two judgments, filed in evidence in the present suit.

Judgment was given for the administrator in the sum recovered in Texas, but against this the court below allowed the demands of A to the amount of about $1,400. The latter appealed, and B prayed an amendment of the judgment, striking out this amount of offset. A claimed a reversal of the judgment on the grounds named, that he had no notice of the demands of B, that they were unfounded, and that his attorney was sick, and the case tried without counsel in his behalf. All the objections were overruled, and B's prayer granted for judgment in the original sum awarded in Texas. The court said that A was in court, in that action, and bound to take notice of all adverse proceedings and defences; that the judgment, when rendered, became conclusive upon the parties until reversed on appeal, or in some other way set aside; that the sickness of A's counsel, and his inability to attend to the case when tried, might have been a good ground for a continuance by the court in Texas, but that it was not a ground in Louisiana to annul a judgment rendered in the former State, and otherwise valid; and that that judgment was equally conclusive against the cross-demands now set up by A, and that he should not have been allowed the credits mentioned.[1]

In an action upon a judgment for costs, rendered in another State, the defendant attempted to impeach the judgment by showing that the counsel who brought the suit in his name, and conducted it to its termination, did not file his warrant of attorney. The Supreme Court of Pennsylvania ruled that though this might have been ground for an application to open the judgment in the State where it was declared, or for a writ of error, or for an action against the attorney, it was no ground whatever for impeaching the judgment in a collateral action.[2]

A decree in favor of the complainant, rendered in Virginia, was

[1] McFarland *v.* White, 13 La. An. 394.

[2] Rogers *v.* Burns, 27 Penn. St. 525; Cyphert *v.* McClune, 22 Penn. St. 195; Coxe *v.* Nicholls, 2 Yeates, 546; Denton *v.* Noyes, 6 Johns. 296; Compher *v.* Anawalt, 2 Watts, 490.

offered in evidence between the same parties, in a suit as to the same matter, in Louisiana, and its admission strenuously contested on grounds of irregularity and fraud. The court below rejected the decree, but that ruling was reversed on appeal, and judgment given in accordance with the Virginia decree. This judgment having been but partly satisfied in Louisiana, suit was again instituted in Virginia, when the defendants again attempted to impeach the first degree. But the court, relying upon the judgment pronounced in Louisiana, refused to consider the attack upon it.[1]

It seems to result from the cases cited, that where the validity of a judgment or decree of one State is passed upon in another, and the judgment rendered in the latter State is sued upon or pleaded in the former, in an action between the same parties, or their privies, it will make no difference whether the first decree or judgment was wrongly upheld or overthrown, or not; and the court cannot inquire whether the judgment rendered in their own State, and perhaps by themselves, was right or wrong, but, under the Constitution and act of Congress, must accept the decision of a court of another, and perhaps distant, State, as to their own domestic law.[2] Some strange results seem to follow from this position. Suppose a judgment to have been rendered in Oregon in favor of A, in a suit against B. Afterwards A sues B upon the judgment in Maine; and the court in that State pronounces the judgment void, upon a misconstruction of the law of Oregon. The case then comes up again in Oregon, in some collateral action, between the same parties; the judgment of the court in Maine, which has erroneously construed the law of Oregon, must be accepted as conclusive upon the parties; and the very court which may have pronounced the original judgment must submit, practically, to have its decision overruled by a court of a sister State, and one perhaps of inferior grade.

A case precisely of this kind does not seem to have ever occurred; and the very position taken in the cases cited seems to forbid the raising the question. If this is the effect of the constitutional and statutory provisions on the subject, the position is anomalous indeed.

To take another, and perhaps more forcible, illustration, suppose

[1] De Ende *v.* Wilkinson, 2 Pat. & H. 663; Rogers *v.* Rogers, 15 B. Mon. 364.

[2] Dobson *v.* Pearce, 12 N. Y. 156.

an action of debt to be brought in New York upon the judgment rendered in Massachusetts in the case of Folger *v.* Columbian Ins. Co.[1] The report of that case shows that the Supreme Court of New York had two years before declared the dissolution of the defendant insurance company, under and by virtue of certain statutes of New York; and that the court in Massachusetts pronounced the decree void, as being in excess of the jurisdiction of the New York court, and allowed the plaintiff to recover on certain policies of insurance issued by the company. In an action of debt upon this judgment, would not the court of New York be apt to say: "We passed upon this question of jurisdiction, and as it involves the construction of our own local law, our decision should carry greater weight than that of the court of Massachusetts; we will therefore not stultify ourselves, but, having regard to our own dignity, must dismiss the suit?" Would they not also say that their own decree of dissolution was still in full force and effect, and that other courts were bound to recognize the fact, under the Constitution and act of Congress, until it had been reversed or annulled? We do not question the judgment of the Massachusetts court, for there seems to be another ground, which, acknowledging the decree of dissolution, may justify the decision; and even the ground above mentioned may be just if there was a palpable usurpation of authority by the New York court. But the cases which allow the judgments of courts of sister States to be attacked when in full force, for reasons that could not be alleged in collateral suits in the domestic courts, seem like declaring judicial amendments to "the supreme law of the land."

The fact that a decree of divorce merely has been pronounced, will not estop the wife from suing for alimony in another State, if that matter has not been litigated in the first suit, though this second suit by the wife be one for divorce, as well as alimony, based upon an allegation that the former decree, obtained by the husband, was illegal. And this too, though the bill is dismissed so far as it prays for divorce. But a decree for alimony, in this second suit, will preclude the husband from contesting the claim in a third suit, an action by the wife, in another State, based upon the decree for alimony.[2] In the case cited for this proposition, a

[1] 99 Mass. 267. See Taylor *v.* Columbian Ins. Co., 14 Allen, 353; Coburn *v.* Boston, &c. Manuf. Co., 10 Gray, 243.

[2] Rogers *v.* Rogers, 15 B. Mon. 364. See McCall *v.* Carpenter, 18 How. 297.

husband had sued for a divorce from his wife, in Kentucky. She appeared and defended, but the court decreed in favor of the husband. Afterwards, the wife sued the husband, in the courts of Ohio, where the parties then resided, for a divorce *and alimony;* alleging that the decree in Kentucky was void by reason of want of jurisdiction in that the husband was not a resident of Kentucky at the time of the decree; also that the decree had been obtained by fraud. These allegations were traversed, and the Kentucky decree set up as an estoppel. The court in Ohio, however, decided that the decree had been legally rendered, and by a court of competent jurisdiction; but that, inasmuch as the Ohio court had made no provision out of the estate of the husband for the support and maintenance of the wife, and as the propriety of so doing had not been adjudicated upon in that case, the husband should pay the wife the sum of $3,000 alimony. The money not having been collected in Ohio, the wife sued upon the decree in Kentucky, to subject certain property of the husband to the payment of the alimony. The defendant again relied upon the first decree, rendered at his own suit in Kentucky, and insisted that the Ohio court had no jurisdiction over the subject-matter, and that its decree was therefore void.

In regard to this question, it was held, in accordance with a familiar doctrine, that as the husband had appeared in the Ohio suit and contested the claim of the wife, the court had jurisdiction both of the person and subject-matter.

It was also contended that the Ohio decree had been pronounced in utter disregard of the previous decree in Kentucky between the parties. Upon this point, the court, speaking by Mr. Justice Simpson, said: "If the decree which had been pronounced in the suit between these parties, in the Kenton Circuit Court, in this State, was thus comprehensive, and had the legal effect attributed to it in this argument, then it would seem to follow that so far as the court in Ohio undertook to modify or change it, its action was revisory; it was exercising an appellate jurisdiction which did not belong to it; and consequently its decree was void for want of jurisdiction.

"We suppose the position will not be controverted, that so far as the courts of any of the States might attempt to change or alter the judgments or decrees of another State, upon the ground that the decision of the case was erroneous, they would be assuming

the exercise of a jurisdiction that does not belong to them, and their action in the premises would be wholly invalid.

"In illustration of this principle, we will suppose that an issue had been made, and fairly tried in a court of competent jurisdiction in this State, and a final judgment rendered between the parties on the matters involved in the issue, and that afterwards one of the parties had attempted to relitigate the same matters, between the same parties, in one of the courts of a sister State having jurisdiction in similar cases, and the court there should permit it to be done, and should render a judgment in conflict with the one which had been previously rendered by the court in this State. Would such a judgment be valid in either State? Would not the court that rendered it have virtually assumed, in sustaining the right of one of the parties to retry the same matters which had been previously decided, a revisory jurisdiction over the judgment of a court of another State? The power to relitigate the same matters might not be expressly put upon this ground; but a court that undertakes to do it does, in effect, assume an authority which can only be legitimately exercised by a court having some jurisdiction over the judgment first rendered. As no such jurisdiction is vested in the courts of any of the States, over the judgments rendered by the courts of other States, it follows that its assumption would be unauthorized, and the action of the court in its exercise utterly void and unlawful.

"But while the correctness of this doctrine is conceded, its applicability in the present case is the point to be determined. . . . . Nothing was alleged [in the first suit] by either party in relation to the husband's estate, nor was there any claim for a portion thereof presented by the wife, in the event that the husband should succeed in obtaining a divorce. Her right to it in that event was not therefore put in issue, nor decided by the court, unless the decree which was rendered, granting a divorce to the husband, had the legal effect attributed to it of absolving the husband and his estate from all liability to contribute anything towards the support of the wife."

After showing that the statute upon the subject did not have this effect, he proceeds: "Whether the wife, having failed to present her claim for a portion of the husband's estate to the court granting the divorce, would be thereby precluded from asserting it, in a subsequent action against the husband, it is unnecessary

to determine. It is sufficient for the purposes of the present inquiry that the matter was not *res judicata*, and consequently that the court in Ohio, in the decree which it rendered, did not undertake to retry an issue which had been previously decided by a court of competent jurisdiction in this State. If it were conceded that the wife, by her failure to present her claim to a portion of the estate of the husband, in the suit in which the divorce was granted, ought to be thereby precluded from asserting it in another action, it would not follow that the decree, rendered by the court in Ohio, would for that reason be invalid, or be void for want of jurisdiction. The most that could be urged against it on that ground would be that it was erroneous. Until reversed, however, or if it be irreversible, it is entitled to the same consideration, and has the same legal force and effect, of any other valid decree."

The latter point, we apprehend, was the main one relied upon for the decision; and whatever may be correct as to the first position, that the court in Ohio had rightly entertained the prayer for alimony, it cannot be doubted that having passed upon the question, it must have been considered as conclusive in all other courts of the Union, in accordance with the provisions of the Constitution and act of Congress.

The record of a judgment in a sister State in favor of the plaintiff establishes conclusively, not only the right of action, but also the right of the plaintiff to sue in the capacity in which he brought the original suit. For only such pleas as would be good to an action upon the judgment in the sister State may be pleaded elsewhere. A plea to the capacity of the plaintiff to sue, for example, as a lunatic, by next friend, would be a plea in abatement, proper only in the original action; and if not then pleaded, it could not be pleaded to a suit upon the judgment in that State, or, consequently, in any other.[1] So a judgment for a party, rendered in another State, is conclusive evidence of the existence of that party at the time of the rendition of the judgment.[2]

And it has been held that the omission by the plaintiff in a suit in another State, upon a penal bond, to assign breaches and have the damages assessed by a jury, cannot be alleged as a defence to

[1] Cook *v.* Thornhill, 13 Tex 293; Wayland *v.* Porterfield, 1 Met. (Ky.) 638.

[2] Cook *v.* Steuben Co. Bank, 1 G. Greene (Iowa), 447.

a suit upon the judgment rendered in the case.[1] So, too, it has been said that where it appears that the plaintiff might have insisted upon his right to recover upon all grounds relied upon in a new suit by him in another State, the former judgment against him will be conclusive.[2] But both of these propositions may be doubted.[3]

It is not a good plea to an action against executors, founded on a judgment in a sister State, that there were never any assets of the testator in that State; for as the judgment there would have been effectual to authorize execution against any assets which the defendants might at any time thereafter have possessed, so it would be sufficient to authorize judgment against them when sued upon elsewhere, and execution upon any assets to be found by virtue of the judgment in the second action.[4]

In a suit for an injunction by a principal against a surety, to restrain the latter from selling certain property of the former, which the surety claimed had been forfeited by the failure of the principal to carry out an agreement for the rent of a hotel, the principal offered evidence, received on a former trial between the parties, to the effect that the hotel property had become untenantable, contrary to the agreement with the lessor, whereby he had been compelled to abandon the property before the lease expired, and without rendering himself liable to the lessor for the reason named. The surety, thinking him liable, had effected a settlement with the lessor, by paying him several thousand dollars, on account of which he was proceeding to sell the property in question. To rebut the testimony offered by the complainant, that he had incurred no liability in abandoning the hotel, the defendant surety introduced the record of a judgment rendered in another State, in a suit between the present complainant and the lessor of the hotel property, wherein it was decided that the former was not justified in abandoning the property, and that he was liable on the lease for the rent of the unexpired term. The court held that this concluded the principal as to his liability, that the settlement between the surety and lessor was therefore proper, and denied the injunction to restrain the surety from selling the property in question.[5]

A similar case is reported from the Supreme Court of New

[1] Goodrich *v.* Jenkins, Wright, 348; S. C. 6 Ohio, 44.

[2] Baker *v.* Rand, 13 Barb. 152.

[3] See, for a discussion of this subject, *ante*, pp. 103–112.

[4] Davis *v.* Connelly, 4 B. Mon. 136.

[5] Destrehan *v.* Scudder, 11 Mo. 484.

York.[1] In that case the owner of a vessel in New York became indebted to another, who seized his vessel in Ohio, under a statute of that State. The present plaintiff became surety in a bond for the release of the vessel. The principal debtor defended the suit, but judgment was rendered against him, and the plaintiff, his bondsman, was compelled to pay the amount. In the present suit by the latter against his principal for reimbursement, the record of the judgment in Ohio was held conclusive of the validity of the claim, and of the seizure and proceedings.

An interesting but somewhat novel case is reported from the Richmond Superior Court of Georgia.[2] It was a motion to enter satisfaction of a judgment rendered in that court under the following circumstances: The plaintiff, after obtaining the judgment just mentioned, sued thereon in Edgefield, South Carolina; to which the defendant pleaded *nul tiel record*, the statute of limitations, and set-off; and judgment was rendered for the defendant. The plaintiff afterwards levied execution upon the first judgment; whereupon the defendant made the present motion to enter satisfaction, on the ground that the judgment in South Carolina was evidence of payment.

The court decided in favor of the defendant, taking two positions. In the first they say: "Would the judgment rendered for the defendant in Edgefield be a bar to any subsequent suit on the judgment against him in Richmond, if such subsequent suit were commenced in any of the courts of South Carolina? There can be no hesitation in saying it would, as that judgment was conclusive upon the subject-matter of it between the parties. If conclusive in South Carolina, and the same faith and credit are to be given to the judgment in every court within the United States as by law it would have in South Carolina, it follows that the judgment in Edgefield would be as conclusive and afford the same protection to the defendant in any other State where suit might be brought, and that as well in Georgia as elsewhere."

In the second position, the court say: "The record from Edgefield shows three distinct pleas, *nul tiel record*, the statute of limitations, and a set-off. The verdict and judgment are general. It is therefore impossible for this court to know certainly from the record on which particular plea the judgment was rendered. Yet as the plea of *nul tiel record* would be answered by the adduction

[1] Stedman *v.* Patchin, 34 Barb. 218. [2] Harris *v.* Williams, Dud. 199.

of the exemplification of the judgment in Richmond, on which alone the plaintiff could proceed, and as there was no limitation of the judgment by our laws, it is strongly to be presumed that the case turned on the plea of set-off; and as the matter of set-off arose subsequently to the judgment in Richmond, it must be considered equivalent to payment; at all events, the judgment being general, the latter plea must be included in it."

But suppose the judgment had been rendered upon a plea of the statute of limitations of South Carolina (which would have been a good plea[1]) how would this have affected the question? Such plea would seem to be a bar only in South Carolina; not being a plea to the merits, but only to the remedy, the judgment could not be pleaded in bar to another action in Georgia,[2] and hence could not have been a ground to enter satisfaction upon the former judgment. In any view of the case, however, the ground of the judgment rendered in South Carolina could not be certainly ascertained, so that the decision seems to be of doubtful authority.

The effect of a judgment of a sister State in insolvency, under a law of that State, arose in Vermont in the recent case of Hall *v.* Winchell.[3] The case was an action of debt upon a judgment of the Common Pleas of Massachusetts, rendered in 1858. The defendant pleaded *inter alia* his discharge in insolvency in Massachusetts; and that the debt sued upon was contracted prior to the institution of the proceedings in insolvency, in 1863. The plaintiff admitted that the parties were both residents of Massachusetts at the time of the judgment; but he alleged that the cause of action arose, and the promises for the breach of which the plaintiff recovered the judgment sued upon, were made and to be performed in Vermont. He further alleged that prior to the proceedings in insolvency he had brought suit against the defendant and attached his property in Vermont. The defendant demurred; and the demurrer was sustained.

The court, Wilson, J., said: "It appears to be well settled in this State that a judgment rendered in one State, by a court having jurisdiction of the suit, will operate as a merger of the cause of action, and be a bar to the further prosecution of a suit in another State between the same parties and upon the same claim. But whether such is the effect of the plaintiff's judgment upon his original claim, it is not necessary to decide; for whether it was

[1] McElmoyle *v.* Cohen, 13 Peters, 312. [2] Ibid. [3] 38 Vt 588 (1866).

the judgment, or the claim on which the judgment was founded, that was due to the plaintiff at the time of the institution of the proceedings in insolvency, is of no importance. Either of them was a debt due to the plaintiff, within the meaning of the statute.

"The plaintiff's counsel insists that the attachment in this State, prior to the commencement of the proceedings in insolvency which resulted in the defendant's discharge, should except his debt from the operation of the discharge; but we think the language of the statute does not justify such conclusion. The statute makes no such exception. It is a law of discharge; it does not merely take away the remedy in that State, but it fully and absolutely discharges the debt everywhere. Courts here should give the same operation and effect that was intended by the legislature of that State."

It must be remembered that, in order to give this conclusive effect to a judgment, whether foreign or domestic, there must have been a trial on the merits of the case; and if there has been a judgment upon any preliminary matter, before a hearing upon the main issues of the case, as, for instance, a dismissal for want of appearance, or prosecution, the judgment is not an estoppel as to the cause of action;[1] and for the very good reason that there has been no adjudication, in such case, upon this point. The judgment would, upon the general principles of estoppels of this kind, be conclusive upon this particular matter of the jurisdiction, so that the parties could not again question the fact that there had been no appearance by the defendant in the former action, or any other fact for which the judgment had been pronounced.

So, also, where suit was brought upon a note, and the defendant pleaded in bar a judgment rendered in a foreign court, the record of which showed that suit had there been brought between the same parties, upon the same and other notes, and judgment had been given in favor of the plaintiff on the other notes, but as to the one now in question the defendant had gone without day, or had been discharged, the court allowed evidence to be received to show that the plaintiff had withdrawn the note, and that it had not been passed upon, and that therefore there was no estoppel.[2] The rule

[1] Sarchet *v.* Sloop Davis, Crabbé, 185, and cases cited; McElmoyle *v.* Cohen, 13 Peters, 312; Matoon *v.* Clapp, 8 Ohio, 248. So of a counter-claim presented against a suit in a sister State, but dismissed for want of prosecution. Rankin *v.* Barnes, 5 Bush, 20 (1868).

[2] Burnham *v.* Webster, 1 Woodb. & M. 172; Baker *v.* Rand, 13 Barb. 152, 160, 161, and cases cited.

in such cases is thus stated by the learned Mr. Justice Nelson: [1] "The judgment of a court of concurrent jurisdiction, or one in the same court directly on the point, is as a plea a bar, and as evidence conclusive . . . . between the same parties upon the same matter directly in question in another court or suit; but is no evidence of a matter which comes collaterally in question merely, nor of matter incidentally cognizable, or to be inferred by argument or construction from the judgment." [2] Secondly, "if it does not appear from the record that the verdict and judgment in the former suit were directly upon the point or matter which are attempted to be again litigated in the second action, the fact may be shown *aliunde*, provided the pleadings in the first suit were such as to justify the evidence of those matters, and that it also appeared that when proved the verdict or judgment must necessarily have involved their consideration and determination by the jury." [3]

This subject has been considered at length in the chapter on Domestic Judgments *in Personam*.

The cases we have been considering also show that the judgment must have been final and conclusive in the State in which it was rendered, in order to give it conclusive effect; otherwise the judgments of sister States would be accorded greater effect than where they were pronounced. And this is also the doctrine in England.[4]

The rule of conclusiveness also holds in the Court of Chancery; and this court will not permit one who has had his claims investigated in another State to raise the same questions for reinvestigation on the same facts.[5] Therefore an answer to a bill filed in Vermont that a decree was pronounced in Massachusetts, dismissing a bill in chancery for the same cause, between the same parties, the court having jurisdiction, is a good estoppel.[6]

And though the parties are estopped to question the merits of a case adjudicated in another State, they are not precluded from inquiring into the character and legal operation of the judgment.[7]

[1] Lawrence *v.* Hunt, 10 Wend. 80, 83.

[2] Duchess of Kingston's Case; Jackson *v.* Wood, 8 Wend. 9; S. C. 3 Wend. 27.

[3] See Bailey *v.* O'Connor, 19 N. H. 202.

[4] Frayes *v.* Worms, 10 Com. B. N. S. 149; Plummer *v.* Woodburne, 4 Barn. & C. 625; Douglas *v.* Forrest, 4 Bing. 686.

[5] Brown *v.* Lexington & Danville R. Co., 2 Beas. 191; Low *v.* Mussey, 41 Vt. 393; Munson *v.* Munson, 30 Conn. 425. See Pennington *v.* Gibson, 16 How. 65; Nations *v.* Johnson, 24 How. 195, 203.

[6] Low *v.* Mussey, *supra*.

[7] Smith *v.* Smith, 17 Ill. 482; Candee *v.* Clark, 2 Mich. 255; Knapp *v.* Abell, 10 Allen, 485; Hall *v.* Williams, 6 Pick. 232; Rangely *v.* Webster, 11 N. H. 299; Jones *v.* Gerock, 6 Jones Eq. 190.

The case first cited for this proposition was an action upon a joint judgment of a sister State, from the record of which it appeared that a defendant therein, not sued in the present action, had not been served with process in the first suit. In most of the cases which have occurred upon this subject, the defendant who was not served has raised the objection, but in this case the defendant who was properly before the court was alone sued in the second instance, and raised the objection, and the court sustained it. Mr. Justice Caton said: "While he may not deny that it is a judgment against him, he may deny that it is a judgment against him and Hall."[1]

In the case of Jones *v.* Gerock, above cited, the complainant filed a bill in chancery, in North Carolina, for dower and a distributive share. The defendants objected that she had filed a bill for the same purpose in Alabama, and had obtained a decree granting to her both objects; that her claim for a distributive share had been fully satisfied; and that in the case of the dower she had had lands of her husband laid off to her, in conformity to the decree. They therefore contended that she was estopped to maintain her present suit. But the objections were overruled. The court said that they did not understand the decree rendered in Alabama as embracing any property not in that State. As to the personal property, it would be necessary that it should be administered under the orders and authority of the courts of North Carolina, and that the courts of Alabama could exercise no control over it. And in respect of the decree for dower, the court considered it as having reference to lands in Alabama only, so that those set off could not amount to a full satisfaction of the widow's claim.

The case of Rocco *v.* Hackett[2] well illustrates the principle that the courts of one State will not allow parties to show that a court of another State has made an erroneous decision. That case was a suit in New York upon a judgment rendered in Massachusetts, on service and appearance, in an action upon a prior judgment in Massachusetts, rendered without either service or appearance,

[1] See also Suydam *v.* Barber, 18 N. Y. 468; Reed *v.* Girty, 6 Bosw. 567. In Brown *v.* Birdsall, 29 Barb. 549, Mr. Justice Roosevelt says: "Where joint debtors reside in different States, they may be sued separately in the respective States, having jurisdiction of their respective persons or property, and a judgment in such case against one in one State is no bar to a recovery against the others in another State."

[2] 2 Bosw. 579.

the defendant being a non-resident. The court, Woodruff, J., said: "We are not at liberty to inquire upon what views of the law that court proceeded; or whether, if we had to pass upon the same questions, we should have rendered the same judgment. We can no more say that that court erred in holding the previous judgment, obtained without actual service of process on the person of the defendant, valid and binding, and therefore we will disregard their adjudication upon that question, than in any case where it appeared that a judgment was recovered on demurrer to a complaint we would hold the judgment open to inquiry, because we deemed the complaint insufficient in law to warrant a judgment."[1]

In the case of Hassell *v.* Hamilton,[2] the plaintiff suing to recover a slave, and deriving title through a decree of the Supreme Court of Tennessee, endeavored to show that that court had made a mistake in decreeing to him title to another slave of the same name as the one he was now suing for; and that the mistake and real intention of the court appeared clearly both from the whole record and the matter adduced in evidence at the present trial. But the court replied that the alleged mistake could not be noticed in the courts of another State; nor could such courts reform a decree of a sister State, so as to make it speak the unexpressed intention of another court.

So in a case in the Supreme Court of Iowa,[3] the defendant to an action upon a judgment rendered in a sister State endeavored to show that the judgment was void, because rendered upon a contract made while he was a minor, and not for necessaries, and that he did not appear by guardian but by attorney. But the court said that the defendant's remedy was by a writ of error *coram nobis*, or some other similar process, in the court of the sister State. If there was error in fact, it was an irregularity merely, and could no more affect the validity of the judgment than if it had been an error of law. In either event the error would not render the judgment void, but only erroneous; and until set aside in the State where rendered, it was not liable to impeachment elsewhere.[4]

Judgment by confession in the clerk's office, during vacation, is

[1] See Imrie *v.* Castrique, 8 Com. B. N. S. 405; S. C. in error, Law R. 4 H. L. 414.

[2] 33 Ala. 280.

[3] Milne *v.* Van Buskirk, 9 Iowa, 558.

[4] See also Weyr *v.* Zane, 3 Ohio, 306; Goodrich *v.* Jenkins, Wright, 348; Riley *v.* Murray, 8 Ind. 354; McLendon *v.* Dodge, 32 Ala. 491; Gunn *v.* Howell, 35

also conclusive;[1] and the same is true of judgment confessed by an attorney, by virtue of a warrant empowering "any attorney of any court of record in the United States to confess judgment."[2]

Nor is it necessary to the conclusiveness of the record that it state in detail all the proceedings in the case. It will be sufficient if it shows the subject-matter of the suit, jurisdiction over the parties, and the final judgment.[3]

The question was raised in Maryland, in the year 1824, whether the Federal courts were foreign to the State courts, so as to be liable to impeachment upon the merits, as at that time was supposed to be the law as to foreign judgments.[4] The case referred to was an action of ejectment, in which the appellee claimed title to certain real estate in Baltimore, levied upon, in attachment, in the Federal Court of Maryland, by the United States, and sold by the marshal to him. The suit in the Federal Court was upon a bill of exchange.

Upon the present trial, Mr. Wirt, Attorney-General of the United States, and Mr. Harper, for the appellant, contended that there was no proof of the handwriting of the drawer of the bill referred to, in the suit in the United States Court, or of that of the indorsers of the same; that there was no evidence that the bill had been presented for payment, and none that the debt was due. The judgment was a foreign one, and it made no difference whether it came before the court incidentally or directly; in either case it was subject to impeachment.

Mr. Chief Justice Buchanan, who spoke for the court, said that though the rule was that foreign judgments were not conclusive of the merits, where the parties claiming the benefit of them apply to our courts to enforce them, still when such judgments came incidentally under consideration, they had the same force and effect as domestic judgments.[5] But the Federal courts were not foreign

Ala. 144; Hassell *v.* Hamilton, 33 Ala. 280; Taylor *v.* Kilgore, Ib. 214; Hart *v.* Cummins, 1 Clarke (Ia.) 564; Struble *v.* Malone, 3 Ib. 586; Milne *v.* Van Buskirk, 9 Iowa, 558; Indiana *v.* Helmer, 21 Iowa, 370; Barringer *v.* Boyd, 27 Miss. 473; Conway *v.* Ellison, 14 Ark. 360; Buford *v.* Kirkpatrick, 8 Eng 33.

[1] Harness *v.* Green, 19 Mo. 323.

[2] Randolph *v.* Keiler, 21 Mo. 557.

[3] Knapp *v.* Abell, 10 Allen, 485. Per Gray, J. See Grignon *v.* Astor, 2 How. 340; Hockaday *v.* Skeggs, 18 La. An. 681.

[4] Barney *v.* Patterson, 6 Har. & J. 182.

[5] Taylor *v.* Phelps, 1 Har. & G. 492. But where the judgment through which title is claimed is void, as for want of jurisdiction, the fact may be shown, and the chain of title thus destroyed. Rider *v.* Alexander, D. Chip. 267; McCall *v.* Carpenter, 18 How. 297.

to the State courts. The Constitution and laws of the United States were the supreme law of Maryland; the laws of Maryland furnish rules of decision for the United States Court, and causes commenced in the State courts might be removed for trial to the Circuit Court. The citizens of Maryland, he continued, were returned as jurors in that court, and were amenable to its process; and their property was liable to seizure and sale by the marshal of the district, under executions from that court: these and other attributes of a domestic court placed it upon a ground very different from that of a foreign court.[1]

As the result of the cases, the construction placed upon the Constitution and acts of Congress relating to the judgments of courts of record, of the sister American States, and of the Federal courts, may be thus stated:

1. Such judgments are to be regarded as matters of record throughout the Union.

2. Such judgments, if final and conclusive where rendered, are to be regarded as conclusive throughout the Union upon all issues that were tried in the sister State, even though the proceedings were irregular and erroneous, and though an appeal or proceeding to vacate the same be pending;[2] but their character or nature may be examined.

But the second rule is subject to the qualification, already intimated several times, that the judgments are not absolutely void, either by the general principles of justice as understood in civilized countries, or by the law of the State in which they were rendered.

Let us now turn again to the judgments of foreign countries and of colonies. In a case of high authority, decided near the beginning of the present century in the King's Bench,[3] the plaintiff declared in *assumpsit* upon a foreign judgment, rendered in the island of Tobago, and at the trial before Lord Ellenborough produced a copy of the proceedings and judgment, certified under the handwriting of the chief justice of the court which pronounced the judgment; which, after containing an entry of the original declaration, set out a summons to the defendant, therein

[1] To the same effect, Thompson *v.* Lee Co., 22 Iowa, 206. Womack *v.* Dearman, 7 Port. (Ala.) 513.

[2] Merchants' Ins. Co. *v.* DeWolf, 33 Penn. St. 45. And the same is true of the judgments of foreign countries. Scott *v.* Pilkington, 2 Best & S. 11.

[3] Buchanan *v.* Rucker, 9 East, 192; S. C. 1 Camp. 72.

described as formerly of Dunkirk, and now of London, which summons was returned, "served, etc., by nailing up a copy of the declaration at the court-house door." Judgment was afterwards given by default. It was alleged, and there was parol proof, that this mode of summoning absentees was warranted by the laws of the island, and commonly practised there.

In delivering the opinion of the court, Lord Ellenborough said: "There is no foundation for this motion, even upon the terms of the law disclosed in the affidavit. By persons *absent from the island* must necessarily be understood persons who have been present and within the jurisdiction, so as to have been subject to the process of the court; but it can never be applied to a person who, for aught appears, never was present within or subject to the jurisdiction. Supposing, however, that the act had said in terms that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? The law itself, however, fairly construed, does not warrant such an inference; for 'absent from the island' must be taken only to apply to persons who had been present there, and were subject to the jurisdiction of the court out of which the process issued; and as nothing of that sort was in proof here to show that the defendant was subject to the jurisdiction at the time of commencing the suit, there is no foundation for raising an *assumpsit* in law upon the judgment so obtained."

A similar case was decided at a later day in the House of Lords.[1] The defendant in the case referred to was a subject of Scotland, while the judgment against him was pronounced in France, and the action was there begun and ended without his presence; the only summons being by affixing notice in a public place, in accordance indeed with the law of France. In his opinion Lord Brougham said that the same principle must be applied as that declared in the preceding case. The language of the court in Douglas *v.* Forrest[2] was referred to in this connection; which was the case of a testator, whose domicile had been in Scotland, where and when the suit in question was brought; but it appeared that he was absent

[1] Don *v.* Lippman, 5 Clark & F. 1. [2] 4 Bing. 686.

from the country at the time of the action, and had no personal notice of the proceedings, which terminated in a judgment against him. It was proved that by the law of Scotland the court might pronounce judgment against a Scotchman for a debt there contracted, though he had no notice of the proceedings, and was absent from the country at the time. After holding that such a judgment was not contrary to natural justice, and that therefore it could be enforced in England, the court proceeded to say: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected." [1]

By the laws of Scotland, as stated by the court in this case, such a judgment would not be conclusive upon the merits, if the defendant should choose to impeach it within forty years, but after that time, if not overturned, it would be an estoppel between the parties; and of course its conclusiveness abroad would depend upon the state of facts, in accordance with a rule already stated.

These cases are sufficient to show that the parties to a foreign judgment are not estopped, ordinarily, to deny the jurisdiction of the foreign court. We say "ordinarily," for it is probable that if there had been an issue raised between the parties upon this point, and this issue had been decided in favor of the jurisdiction, the decision in this particular would bar a retrial of the question. And this, too, though it should be conceded that the defendant's appearance, being merely entered to test the question of jurisdiction, had not *per se* given the court jurisdiction to try the merits of the case.[2]

There are also many English cases, which need not be particularly examined here, which show that foreign judgments are not considered as record evidence in England, but only as evidence of simple contract debt.[3] It would seem to follow from this that

[1] See Scibsby *v.* Westenholz, Law R. 6 Q. B. 155 (1870), reaffirming the doctrine of the above cases.

[2] Whether such appearance would, *ipso facto*, give the court jurisdiction over the defendant for all purposes, see Bissell *v.* Briggs, 9 Mass. 462, 468, 469; Wright *v.* Boynton, 37 N. H. 9; Lincoln *v.* Tower, 2 McLean, 482; Cunningham *v.* Goelet, 4 Denio, 71. As to an adjudication respecting the jurisdiction, see Segee *v.* Thomas, 3 Blatchf. 11; Bonsall *v.* Isett, 14 Iowa, 309; Shawhan *v.* Loffer, 24 Iowa, 217; Hangerford *v.* Cushing, 8 Wis. 324.

[3] Hall *v.* Odber, 11 East, 124; Plummer *v.* Woodburn, 4 Barn. & C. 625; Smith *v.* Nicolls, 7 Scott, 147; S. C. 5 Bing. N. C. 208; Bank of Australasia *v.* Harding, 9 Com. B. 661.

the jurisdiction of the foreign or colonial court could be called in question, even though facts were stated in the transcript which constitute jurisdiction, such as appearance or a return of personal service upon the defendant, by the officer, on the summons or citation.

The American doctrine as to inquiry into the jurisdiction of courts of the sister States is in some particulars in considerable confusion, as we shall see.

It has been already noticed that it was at one time supposed by some of the courts that the rule in the case of Mills *v.* Duryee [1] had gone so far as to declare that the judgments of each State were so conclusive in every other that even the jurisdiction of the court of a sister State was not open to inquiry.[2] But however general the language of the court in that case may appear, it is certain that it is not an authority for this doctrine. The fact has often been pointed out that the record of the judgment there sued on showed explicitly that the court of the sister State had acquired jurisdiction of the person of the defendant, and no question was raised upon this point. The court having had jurisdiction, the judgment pronounced was of course absolutely unimpeachable. The decision must be considered with reference to the facts in the case.

Under what circumstances then are the parties not estopped to allege that the court of the sister State had not jurisdiction of the case resulting in the judgment in question?

We propose to consider first those cases in which the record of the judgment rendered in the sister State is either silent as to matters relating to jurisdiction, or does not contain a direct statement of facts which constitute jurisdiction.

In an early case in Massachusetts,[3] such a question arose. It was an action upon a judgment rendered in Georgia, the record of which showed a return of personal service by the office upon one of the defendants, and "not to be found in the county" as to the other. The record stated an appearance of the party served, by *his* attorney; but in a subsequent part of the record it was recited that the defendants (naming them) appeared by *their* attorney; whereupon judgment was rendered against them jointly. The defendant not served pleaded that he was never a resident of Georgia, had not been served with process in the case, and had

[1] 3 Cranch, 381.

[2] Commonwealth *v.* Green, 17 Mass. 544; Gleason *v.* Dodd, 4 Met. 333.

[3] Hall *v.* Williams, 6 Pick. 232.

not appeared therein. The plaintiff replied the record as an estoppel. But the court overruled the replication on demurrer.

Parker, C. J., said: "If it appeared by the record that the defendants had notice of the suit, or that they appeared in defence, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true, judicially; and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress; for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process, or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it; for it is manifestly against first principles that a man should be condemned . . . . without an opportunity to be heard in his defence."

As to the recital of the appearance of the defendants by their attorney, it was said: "As this is a mere recital founded upon the prior proceedings, this cannot be taken to be an assertion of record that Fiske appeared by attorney, for it appears by the same record that the attorney appeared for Williams only, and there is no plea filed but for Williams. There is nothing therefore in the record which is contradicted by the second and third pleas, and the replication by estoppel is therefore bad and the plea good, which settles the case in favor of the defendants."

In a case in Alabama, similar to Hall *v.* Williams, just referred to, in which two defendants were sued on a judgment against them, rendered in a sister State, it appeared that only one of them was personally served and had pleaded, but the record recited that the parties came by their attorneys. The court held that it would be intended that he only came who had made up the issue for trial.[1]

It is worthy of note in both the cases cited, that the recital in the record was that the *parties* came by attorney, without naming the defendants. It is consistent with this recital that the plaintiff and *one* defendant came by attorney; and it was not, as the cases go, disputing the record to show that one defendant did not appear.

[1] Puckett *v.* Pope, 3 Ala. 552; Catlin *v.* Gilders, Ib. 536.

In an action in Connecticut[1] upon a judgment rendered in Rhode Island, the record showed an appearance of the defendant by attorney; whereupon he offered to show that he had not authorized any one to appear for him, to which evidence the plaintiff objected, on the ground that the record was conclusive of the matter.

The court, however, ruled that the evidence was proper, and its admission involved no contradiction of the record; quoting the language of Lord Mansfield in a case in which he permitted the defendant to show a similar fact. These were his lordship's words: "The record of the common pleas amounts to no more than this, that the attorney prosecuted the suit in the plaintiff's name."[2]

This question has never precisely arisen in the Supreme Court of the United States, which has revisory jurisdiction over the State courts in matters involving the construction of the Federal Constitution and acts of Congress; but the opinion of the court may, perhaps, be inferred from what was said in a well-known case.[3] And though the case referred to related to the question of jurisdiction in the Federal courts, in suits between citizens of different States, the point now referred to would seem to have depended upon the same principles as if it had been a case under the act of Congress. In this case the defendant, L. P. Perry, had not been personally served with notice, nor had he personally appeared in the suit in question; but the record showed an appearance by counsel, and a defence to the action. As to the right of Perry to prove that the attorney had no authority to appear for him, the court, McLean, J., said: "This evidence does not contradict the record, but explains it. The appearance was the act of the counsel, and not the act of the court. Had the entry been that L. P. Perry came personally into court, and waived process, it could not have been controverted. But the appearance by counsel, who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel, under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection."

[1] Aldrick *v.* Kinney, 4 Conn. 380.
[2] Robson *v.* Eaton, 1 Term, 62.
[3] Shelton *v.* Tiffin, 6 How. 163.

The above cases have been almost uniformly followed in America; and there is no rule better settled than that where the record contains no allegation of personal appearance by the defendant, but merely recites an appearance by attorney, there is no estoppel to show that such attorney had no authority to appear.[1] The doctrine, however, is difficult to reconcile with the act of Congress; for the jurisdiction in such cases, it would seem, would be conclusively presumed in the domestic courts.[2]

It must be clear, also, that the parties would be precluded to dispute the fact of appearance by attorney, though not the authority; and for the reason that in the case supposed there is a direct allegation in the record of the entry of an appearance by counsel.

But there are some apparent exceptions to this rule, as in the case of *scire facias* against bail. In suits upon judgments rendered upon *scire facias*, without personal notice of this proceeding, it has been held that the defendant cannot allege the want of notice as a defence. But this is no exception in fact, for in the case of special bail the ground taken was that he would be presumed to be acquainted with the original suit, as he has come into court and there undertaken his peculiar liability.[3] But there have been decisions to the contrary on this point.[4]

In the case of Adams *v.* Rowe, cited in the note, it appeared that the plaintiff in a suit upon a judgment of another State had obtained the same against one Benson, and against the present defendant as his trustee. Personal service had been returned as to both. Execution was issued and returned unsatisfied. About a year afterwards a *scire facias* was sued out against the present defendant, who had in the mean time removed from the State; and the officer returned that he had summoned the defendant by leaving an attested copy of the writ at the last and usual place of abode of the defendant. Judgment was finally rendered against him

[1] Watson *v.* New England Bank, 4 Met. 343; Bodurtha *v.* Goodrich, 3 Gray, 508; Denison *v.* Hyde, 6 Conn. 508; Welch *v.* Sykes, 3 Gilm. 197; Shumway *v.* Stillman, 6 Wend. 447; Kerr *v.* Kerr, 41 N. Y. 272; Westcott *v.* Brown, 13 Ind. 83; Baltzell *v.* Nosler, 1 Clarke (Ia.), 588; Lawrence *v.* Jarvis, 32 Ill. 304; Harshey *v.* Blackmarr, 20 Iowa, 161. The last-named case contains a very exhaustive discussion of the doctrine, by Dillon, J. But see Warren *v.* Lusk, 16 Mo. 102.

[2] *Ante*, pp. 136, 144, 145.

[3] Delano *v.* Jopling, 1 Litt. 117; Ib. 417; Adams *v.* Rowe, 2 Fairf. 89; Poorman *v.* Crane, Wright, 347.

[4] Robinson *v.* Ward, 8 Johns. 86; Holt *v.* Alloway, 2 Blackf. 108.

by default; and this was the judgment sued upon. The court held that the *scire facias* was not the commencement of a new suit, but only a continuance of the original action; that the court of the sister State, having acquired jurisdiction over the defendant, at first retained the same throughout, notwithstanding the fact that there was no personal service of the *scire facias*, or appearance; and the judgment was conclusive.

But where a party dies and an administrator is appointed, this fact alone does not constitute the latter a party to the suit, so as to dispense with personal notice. He must appear and make himself a party to the record; otherwise the court, though having had personal jurisdiction over his intestate, will not acquire it over him. And he may show this fact in a suit in another State upon the judgment, though the record contain a recital that he came in.[1]

In the case just cited, a suit upon a judgment for costs, rendered against a plaintiff in another State, the record recited that the plaintiff's administrator, defendant in the suit for costs, "came in," upon a suggestion of the death of his intestate. In the present suit upon the judgment he denied any appearance, either personally or by attorney; and the question was whether he were concluded by the allegation in the record. Mr. Chief Justice Shaw said: "By the laws of Maine, as well as those of Massachusetts, when a plaintiff dies his administrator, being appointed under the laws of the same State, without commencing a new suit, may come in and prosecute the existing suit in the same manner as if he had commenced a new one. We understand the record to state that, in pursuance of these provisions of law, Dodd, claiming to be administrator, with a right and power as administrator to prosecute that suit, appeared and made himself a party to it, in order to prosecute the same to judgment. If this were so in fact, the court clearly had jurisdiction of the same and of the person of the administrator, as such plaintiff, with power to render judgment against him, on failure to prosecute according to his undertaking. Nor could he defend himself by showing that he has never been appointed administrator in Maine. . . . . Is the record conclusive of that fact [of appearance]? The answer to this question we think depends on this, whether such appearance or coming in, by himself personally, or by his authorized attorney, is necessary to give the court jurisdiction; and we think that it is.

[1] Gleason v. Dodd, 4 Met. 333.

The administrator is a distinct party from the original plaintiff. He is not *de facto* a party on the fact of the death of the testator or intestate being suggested, and cannot be made such unless by his own voluntary act, or when he is compellable to appear, on summons, and has in fact been summoned. By the death of the original plaintiff the suit is suspended, and must remain so unless an administrator, qualified to act in the State where the suit is pending, shall thus come in. Until this is done, the court have no jurisdiction of the person of such administrator. We think then it is clear, that, as to this fact, thus necessary to give the court jurisdiction, the judgment is not conclusive."

In commenting upon the concluding remark of the court in a case already referred to,[1] that "the full faith and credit required to be given in each State to the judicial proceedings of other States will prevent the admission of any evidence to contradict the facts which show a jurisdiction, if such appear on the record," the learned judge said: "This last remark we consider, taken in connection with the subject-matter, as applying to all such facts as tend to show jurisdiction of the court over the person; such as that he was arrested and gave bail, or was personally summoned; indicating his actual presence in the State at the time of the commencement of the action, and of course subject to its jurisdiction, or other facts of the like nature. . . . . It therefore follows that the conclusiveness of judgments, as to matters tending to show that the court had jurisdiction, does not extend to such recitals, but only to specific averments of fact, such as an arrest, personal service, or personal appearance."

It is in conformity with this principle that the jurisdiction cannot be impeached by a general allegation of want of jurisdiction.[2] In the case cited, a plea that "the proceeding was not within the jurisdiction of the Superior Court of Ohio" was held bad, as containing no specific allegation of fact. Such a statement is inferential, and might have been founded upon a fact which would not justify it. So where the record showed that the defendant was a non-resident, and then recited that it appeared to the court that he had notice of the pendency of the suit, the recital was not even considered *prima facie* evidence that the defendant was served with notice in the State in which the original suit was brought; and service without the State would be void. The court said that the

[1] Hall *v.* Williams, 6 Pick. 232.

[2] Davis *v.* Connelly, 4 B. Mon. 136.

record stated a conclusion only, and not the fact upon which it was based. Such an adjudication on the question of notice could be held, in view of the non-residence of the defendant, to mean no more than that such notice had been given, actual or constructive, as, according to the law of the sister State, would warrant a judgment *in rem*.[1]

Parties and privies then will not be precluded from inquiring into the jurisdiction,—

1. When the record is silent upon the subject;

2. When it recites simply an appearance of the defendant by attorney;

3. When it is ambiguous, obscure, or inferential.

Thus far there is no serious conflict, and the law is well settled; but the next step brings us into confusion. It will, however, appear, as we proceed, that the weight of authority is pretty strongly on one side.

The question is, whether the parties are precluded from denying the jurisdiction of the court of a sister State, when the record of the judgment contains a statement of matters sufficient to constitute jurisdiction. Let us first consider the cases which affirm the right of disputing the jurisdiction.

It may be well to remark at the threshold of this inquiry, that it has nothing to do with the form of pleading. Whether the jurisdiction is opened by the pleas of *nul tiel record*, or *nil debet*, or whether the matter should be specially pleaded, we have no concern to ascertain. Our inquiry is whether any plea is admissible to the jurisdiction of a court of a sister State, against the allegations of the record.

Among the cases often cited in the affirmative of the question is Starbuck *v.* Murray,[2] decided in the Supreme Court of New York, in 1830. This was an action upon a judgment rendered in Massachusetts. The defendant pleaded, *first*, that at the commencement of the suit in which the judgment declared on was rendered, he was, and ever since had been, a resident of the city of New York, and that he was not during any of the time of the suit in question in the State of Massachusetts; *secondly*, that the suit was by attachment of property, and that he was not served with process and did not appear thereto in person or by attorney. The plaintiff demurred to the first plea; and to the second replied that the

[1] Downer *v.* Shaw, 22 N. H. 277. [2] 5 Wend. 148.

defendant ought not to be admitted to plead the plea, by which he denied appearance in person or by attorney, because the judgment record declared and averred that *he appeared to the suit.* Demurrer to the replication, which was sustained.

Mr. Justice Marcy, speaking for the court, said: "But it is strenuously contended that the defendant is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the State courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defence by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of State court authority shows it to be a proper issue) is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. Unless a court has jurisdiction it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction; and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction. So long as the question of jurisdiction is in issue, the judgment of a court of another State is in its effect like a foreign judgment; it is *prima facie* evidence; but for all the purposes of sustaining that issue, it is examinable into, to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character

of a record, and for all purposes should receive full faith and credit." [1]

A recent case in the Supreme Court of Massachusetts is still more decidedly on this side of the question.[2] In that case — a suit upon a New Hampshire judgment — the record declared that the sheriff had summoned the defendant "by giving him in hand a summons in the form prescribed by law." The defendant then offered evidence in contradiction of this allegation, which was refused; but on appeal the court were of opinion that it should have been received.

Shaw, C. J., said: "We take it to be now well settled in this Commonwealth, that although a judgment of one State of the Union against a citizen of another State is *prima facie* evidence both of the jurisdiction of the court and of the merits, and notwithstanding the United States statute of 1790, providing that full faith and credit shall be given in each State to the judicial proceedings of another, yet such judgment is not conclusive; but it is competent for the defendant, when suit is brought against him on such judgment, to show by proof that the court which rendered the judgment in the original suit in point of fact had no jurisdiction over the persons of the parties or the subject-matter of the controversy." [3]

After attempting to reconcile this ruling with that of earlier cases, and particularly with that of Hall *v.* Williams,[4] the learned chief justice proceeds: —

"The subject was much discussed in State courts; and subsequently it was decided by the Supreme Court of the United States that Congress did not intend, by the act of 1790, to declare that the judgment in one State against the person of the citizen of another, who had not been served with process or voluntarily appeared, should have such faith and credit in every other State as it had in the courts of the State in which it was rendered. They express the opinion that Congress did not intend to give the full force of domestic judgments to the judgments of courts of other States by the act of 1790; and expressed their concurrence with the various decisions of State courts, holding that Congress did

[1] See Noyes *v.* Butler, 6 Barb. 613.

[2] Carleton *v.* Bickford, 13 Gray, 591.

[3] Bissell *v.* Briggs, 9 Mass. 469; Hall *v.* Williams, 6 Pick. 232; Gleason *v.* Dodd, 4 Met. 333; Bissell *v.* Wheelock, 11 Cush. 277; Bodurtha *v.* Goodrich, 3 Gray, 508.

[4] Pick. 232.

not intend that the statute should be so applied as to change the effect of judicial records of this description." [1]

Again: "We can perceive no distinction in principle between this case and many of the cases, in which it was recited in the record that a party had appeared, that he had appeared by his attorney, and the like, but where he was still allowed to prove that the attorney made a mistake or committed a fraud, that in fact no attorney had appeared for him." [2]

These cases have been followed, or the same doctrine maintained, in Wisconsin, Texas, and in the Court of Appeals of New York; [3] but the grounds upon which they rest are not materially different from those presented above.

Among the cases in which it is denied that the record may be disputed, Lincoln *v.* Tower [4] is important. In this case, Mr. Justice McLean denies the correctness of the rule in Starbuck *v.* Murray. In this connection he says: "It must be admitted that the 'proposition assumes the fact to be established.' The fact is, that the defendant was served with process, or appeared to the action; and this the record asserts. And the plaintiff insists that this, being a fact which is matter of record, cannot be denied by a plea. But this, says Justice Marcy, assumes the fact to be proved. Most certainly it does. The fact is proved by the highest evidence. It is not to be questioned in any court.

"Apply the same argument as to the fact of judgment having been rendered. If this be shown by the record, can it be denied by a plea? And this too would assume the proposition to be proved. In the language of Mr. Justice Marcy, it may perhaps be asked, for what purpose does the defendant question the fact of judgment? Solely to show the invalidity of the record. Now the record, and the record only, can prove the rendition of the judgment, as it proves the appearance of the party. Of both these matters the court before whom the proceedings were had had judicial cognizance, and they are equally established by the record."

[1] D'Arcy *v.* Ketchum, 11 How. 165. See Phelps *v.* Brewer, 9 Cush. 390.

[2] Bodurtha *v.* Goodrich, 3 Gray, 508. See also Folger *v.* Columbian Ins. Co., 99 Mass. 267, in which it was held that a decree of a sister State, dissolving a corporation, was void for want of jurisdiction; though the jurisdiction had been exercised by virtue of a statute of the sister State. And see Barringer *v.* King, 5 Gray, 9; Latterett *v.* Cook, 1 Clarke (Ia.), 1.

[3] Rape *v.* Heaton, 9 Wis. 328; Norwood *v.* Cobb, 24 Tex. 551; S. C. 15 Tex. 500; 20 Tex. 588; Kerr *v.* Kerr, 41 N. Y. 272.

[4] 2 McLean, 473.

One of the most ably considered cases upon the same side was decided in 1851, in the Supreme Court of Michigan.[1] The defendant pleaded want of personal notice to a suit upon a judgment rendered in the State of New York. The plaintiff replied that the record averred personal service and appearance by attorney, whereby the defendant was estopped; to which there was a demurrer.

After presenting the line of argument in Starbuck *v.* Murray, Mr. Justice Green, speaking for the court, says: "In considering the validity of this course of argument, the question forces itself upon the mind irresistibly, whether the Supreme Court of New York or of Massachusetts ever adopted, or would for a moment listen to, such or any similar arguments, in a suit brought upon a record of one of its own judgments; and if not, does not this argument clearly import a want of that faith and credit which the Constitution and law of Congress obliges the courts in every State to give to the records and judicial proceedings of the courts of every other State? To say that under the operation of a rule which a State court unhesitatingly applies to its domestic records of judgments, a court of equal and the highest dignity of a sister State could always sustain its jurisdiction, if it had any solicitude to do so, and for that reason to allow facts appearing upon its records, material to the validity of its judgments, to be controverted by plea, and disproved upon an issue to the country, seems to me to be treating such records with more doubt and suspicion of their integrity than with faith and credit.

"That the courts of New York would not allow the fact of personal service of the declaration and notice of rule to plead, appearing upon the record in the case before us to be controverted by plea or proof, in an action upon the judgment in that State, there can be no doubt.[2]

"But it is said that the doctrine that the jurisdiction of the court rendering a judgment may be inquired into, when a suit is brought in the courts of another State on that judgment, notwithstanding what may appear upon the record, does not depend merely upon the authority of adjudged cases, but has a better foundation; that it rests upon a principle of natural justice; that

[1] Wilcox *v.* Kassick, 2 Mich. 165.

[2] Adams *v.* Gilbert, 9 Wend. 499; Jackson *v.* Stewart, 6 Johns. 34; Denton *v.* Noyes, Ib. 296; Green *v.* Ovington, 16 Johns. 55. See also Smith *v.* Bowditch, 7 Pick. 137.

no man is presumed to be condemned without the opportunity of making a defence, or to have his property taken from him by a judicial sentence, without showing, if he can, the claim against him to be unfounded. This great principle of natural justice will never be denied here; but is the right, which it acknowledges and protects, violated by making the record conclusive? In the case of Hoxie *v.* Wright,[1] the Supreme Court of Vermont say that if the defendant was entitled to relief, he might on good cause shown have obtained a stay of proceedings in the action then pending, while he had pursued, or had time to pursue, any remedy open to him; and if he had paid the demand on which the judgment was rendered, etc., it would unquestionably have furnished ground for an *audita querela*, or a motion to set aside the judgment.[2] . . . . By debarring the defendant from attacking the record of a judgment against him, collaterally in an action brought in another State, he is not therefore condemned without the opportunity of making a defence."

The conclusions arrived at were these: —

1. "That in an action in one State upon the judgment of a court of general jurisdiction of another State, no plea or proof can be received in contradiction of any material fact appearing by the record, unless such plea or proof would be received in an action upon it in the court in which it was rendered.[3]

2. "That if the record shows a want of jurisdiction, the judgment is a nullity.

3. "That if the record does not show, either that the court had, or that it had not, jurisdiction, the jurisdiction will be presumed; but in such case facts showing a want of jurisdiction may be alleged by plea, and if established a recovery may thus be defeated; and

4. "That where the record shows that the process was not personally served, and that the defendant did not appear in person in the suit, but that an attorney of the court appeared for him, and made defence, the authority of such attorney so to appear will be presumed." Whether the authority of counsel in such case could be questioned was not determined.

The doctrine of Starbuck *v.* Murray has also been considered

[1] 2 Vt. 263.

[2] See also Field *v.* Gibbs, 1 Peters C. C. 156; Lincoln *v.* Tower, 2 McLean, 473.

[3] This is the rule established in the Supreme Court of the United States in Hampton *v.* McConnel, 3 Wheat. 234.

and rejected in the Supreme Court of Missouri, upon grounds similar to those taken by the court in Michigan.[1]

In a case before one of the most distinguished American jurists,[2] involving a decision of a Mexican tribunal, the learned judge, in speaking of the allegation of personal notice, said: "Supposing the proceedings before the Mexican tribunal to be in all respects unexceptionable, my opinion is that the allegations in those proceedings, as to the appearance of the master before the court, and his being heard before the decree of condemnation, would be conclusive on the parties, and would not be traversable or re-examinable in the present case. But if the defence be that the proceedings were not merely irregular and illegal, but were founded in a positive fraud, and that in point of fact the whole record was but a tissue of false accusations and false statements and false proofs, made up to cover the fraud, in which the seizing and prosecuting parties were all confederate, I should think that evidence was admissible to show that the master never was summoned, never did appear, and never was heard before the condemnation, in order to establish, *pro tanto*, the fraud."

The doctrine of the conclusiveness of the record in such cases has been maintained by several other respectable courts, upon grounds either not stated, or substantially the same as those already presented.[3]

The point has never been precisely presented in the Supreme Court of the United States, where alone an authoritative rule can

[1] Wilson *v.* Jackson, 10 Mo. 330.

[2] Mr. Justice Story in Bradstreet *v.* Neptune Ins. Co., 3 Sum. 600, 604.

[3] Westcott *v.* Brown, 13 Ind. 83; Lawrence *v.* Jarvis, 32 Ill. 304; Welch *v.* Sykes, 3 Gilm. 197; Baltzell *v.* Nosler, 1 Clarke (Ia.), 588; Taylor *v.* Runyan, 3 Ib. 474; Walker *v.* Lathrop, 6 Ib. 516; Lapham *v.* Briggs, 27 Vt. 26; Pritchett *v.* Clark, 4 Har. (Del.) 280; Thompson *v.* Emmert, 4 McLean, 96. In Noyes *v.* Butler, 6 Barb. 613, the defendant to a suit upon a judgment of another state pleaded that he had not been notified and had not appeared. The record recited that "the parties appeared." The court held the plea good, and refused to allow the plaintiff to show that the defendant had employed an attorney to appear for him, and that he (the attorney) did appear accordingly. The court say that such proof would be adding to the *record;* while they also say that the plea of the defendant only raised the question whether the judgment sued upon was a record or not. This is strangely illogical. It amounts to this, that the judgment was *not* a record as to the defendant so as to estop him to deny the jurisdiction; it *was* a record as to the plaintiff, so as to estop him from making the proposed reply to the plea of the defendant. Now the judgment, at this stage, either was a record, or it was not; if it was, the defendant would be estopped to dispute it; if it was not, it could not estop the plaintiff to make the reply. The estoppel must be mutual.

be declared; though the question of the right of denying the jurisdiction, where there were no specific allegations in the record showing it, has arisen, as we have seen, and been answered affirmatively.[1] And the language of Mr. Justice Marcy, in Starbuck *v.* Murray, has been quoted with approval,[2] though not in a case in which there was an attempt to dispute a specific allegation of jurisdiction. But we have seen, in a case already referred to,[3] that that court on one occasion expressed themselves in a strong *dictum* against the power to dispute an allegation of service or appearance.

The cases holding the affirmative have all, or nearly all, been founded on the doctrine in Starbuck *v.* Murray; and even in Massachusetts the contrary was for a considerable length of time supposed to be the law, and the doctrine declared in the State of New York was not received until quite recently.[4] Chief Justice Shaw's opinion in the case cited was evidently based in part upon a *dictum*, stated by himself a few years earlier, in Bodurtha *v.* Goodrich.[5] Prior to that time it had been understood that the record could not be disputed, and that Hall *v.* Williams[6] maintained that doctrine. This even seems to have been the view entertained of that case by the learned chief justice himself at one time;[7] and other courts cited it for the same position.[8]

But upon principle we cannot see how the doctrine in Starbuck *v.* Murray can be sustained. The act of Congress, so frequently referred to, declares, in effect, that the judgments of courts of each State shall have the *same* effect as they would have where rendered; no less effect, no greater. The comments of courts of eminent respectability, given at length above, sufficiently indicate what this means. If the allegations as to jurisdiction could not be disputed in the sister State, they must be conclusive throughout the Union. In other words, the rule in relation to domestic judgments must be applied as well to this question as to the question of merits, unless it should be proved that the law of the sister State upon the subject is different from the domestic law.[9]

[1] D'Arcy *v.* Ketchum, 11 How. 165.

[2] Harris *v.* Hardeman, 14 How. 334.

[3] Shelton *v.* Tiffin, 6 How. 163. *Ante*, p. 226.

[4] Carleton *v.* Bickford, 13 Gray, 591 (1859).

[5] 3 Gray, 508.

[6] 6 Pick. 232.

[7] Gleason *v.* Dodd, 4 Met. 333.

[8] Welch *v.* Sykes, 3 Gilm. 197; Westcott *v.* Brown, 13 Ind. 83; Wilcox *v.* Kassick, 2 Mich. 165. See also Woodward *v.* Tremere, 6 Pick. 354.

[9] This seems sufficient to show that the written law is plainly disregarded in allowing an impeachment of the jurisdiction

It follows from the act of Congress that judgments of courts of record are record evidence throughout the Union; and in this proposition all the authorities agree. If then the transcript of the judgment of a sister State is a record, it must be entitled to the high credit of a record in whole and in part, as to every specific, essential allegation which it contains. Jurisdictional facts are vital parts of the record, and how can it then be said that they may be disputed? If the judgments in question were not records, it might be said with some propriety that more credit should be given to matters upon which an issue was tried than to any others; but they are record evidence; and in this there are no grades of credibility, and jurisdictional facts are entitled to the same credit as the judgment upon the issues of the case.

We should then state the rule to be, that where the record contains an allegation of specific facts, sufficient to constitute jurisdiction, parties and privies are estopped to deny the jurisdiction in a suit for the same cause of action; unless the record would be inconclusive in an action upon the judgment in the State in which it was rendered.

In an action in Missouri upon a replevin bond, made in Indiana, it appeared that a statute was in force in the latter State which declared that when given for the stay of execution, such bond, from the date of its execution, "shall be taken as, and have the same force and effect of, a judgment confessed in a court of record against the person or persons executing the same, and against their estates, and execution may issue thereon." But the court in Missouri held that the act could have no extra-territorial effect; that it could not be sued upon as a judgment rendered in a sister State; and that it was not within the Constitution and act of Congress, so as to be entitled to the same faith and effect which it would receive in Indiana.[1]

An action of debt, under the following circumstances, was brought in South Carolina[2] upon a judgment rendered in New York. The judgment sued upon was founded upon a joint note, and rendered against the makers jointly. Only one of the defendants was served or appeared. The other defendant pleaded that he was not notified, and a statute of New York was shown, by which it was provided that in actions against two or more per-

in any case in which it would not be permitted in respect to a domestic judgment.

[1] Foote *v.* Newell, 29 Mo. 400.

[2] Menlove *v.* Oakes, 2 McMull. 162.

sons, upon any joint obligation, contract, or liability, if the process, issued against all the defendants, should be duly served upon any of them, the defendant so served should answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, should be against all the defendants, in the same manner as if all had been served with process. In another section of the same statute, it was provided that such judgment should be conclusive evidence of the liability of the defendant personally served, or appearing; but against every other defendant it should be evidence only of the extent of the plaintiff's demand, after the liability of such defendant should have been established by other evidence.

The court below was of opinion that the plaintiff could not recover against the defendant not served; ruling that the plaintiff's action stood upon the same ground as if it was upon the original cause of action. Upon appeal the court, O'Neall, J., said: "Reading the statute without the aid of note or comment, I do not perceive how there ever could have been a dispute that as against the defendant [not served] the judgment was anything more than one in form, and that in substance it concluded nothing against the person not served. For the provision against every other defendant that it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence, plainly shows that it was intended only as a final judgment against the defendant served, and that everything was left open against the other. If this was not so, why was it provided that it should not even be evidence of the extent of the plaintiff's demand until after his liability was established by evidence? This was putting the plaintiff to prove his case from the beginning. When this is so, there can be nothing like a judgment in its appropriate legal sense. For, according to that, it is the final evidence of the court on the rights of the parties. Here, however, the whole matter is yet to be sifted before the court can decide that the defendant is at all liable." In other words, such judgment on such proof only establishes the *amount* of the plaintiff's demand, not its justice; this may be disputed in an action upon the judgment.

After referring to the decisions of the courts of New York,[1] in support of the above view, Mr. Justice O'Neall proceeds: "But be this as it may, it is very clear that the judgment thus obtained in

[1] Carman v. Townsend, 6 Cow. 695; S. C. 6 Wend. 206; Halliday v. McDougall, 22 Wend. 270.

New York can have no extra-territorial effect. For as against the party not served, it cannot be regarded as a judgment, further than as a mere means by which the partnership effects in New York are made liable to the joint debt. In this respect it is analogous to judgments in attachment, or decrees *pro confesso* against absent defendants in equity." [1]

A case precisely similar occurred in 1846, in the Supreme Court of Connecticut,[2] involving the same statute. It was urged as a reason for sustaining the action upon the judgment rendered in New York, that by the laws of that State a similar suit might there be brought upon the judgment against all the defendants, served and not served, and that the plaintiff would not there be permitted to recur to the original cause of action.[3] But the court replied that it was obvious — and the cases cited from Wendell's Reports showed this — that that action was prescribed there, not because there was in fact any judgment furnishing evidence of liability, but on grounds of local policy, as a convenient mode of proceeding for the recovery of the original debt from all the joint debtors. The regulation pertained to the remedy, and not to the merits, which could not be thus affected.

Cases of foreign attachment are closely allied to these; indeed, the principle pervading them is precisely the same. A case already referred to [4] affords a good illustration. The plaintiff in New Hampshire sued upon a judgment rendered in Vermont. The original writ described the defendant as a resident of the former State; and the return upon it showed an attachment of his property in Vermont, and that he was then living out of that State. The court held that the action must fail in the absence of anything in the record showing personal notice to the defendant in Vermont, or appearance in the suit. They said that the State of Vermont might assert jurisdiction over property situated within its territorial limits, though the owner was not a resident of the State; and that so far the proceedings in that State were conclusive, but no further.[5]

We have already noticed the fact that the statement is sometimes made in the books that actions upon foreign attachment are proceedings *in rem*, so far as the property attached is concerned; and

[1] See Buckner *v.* Archer, 1 McMull. 85; Lesterjette *v.* Ford, Ib. 86, note, cited by court.

[2] Wood *v.* Watkinson, 17 Conn. 500.

[3] Mervin *v.* Kumbel, 23 Wend. 293.

[4] Downer *v.* Shaw, 22 N. H. 277.

[5] Hall *v.* Williams, 6 Pick. 232, 241, cited by the court.

we have shown that the statement is wholly incorrect.[1] The case of Woodruff *v.* Taylor[2] shows that legislation cannot change the nature of such proceedings. It was an action of trespass for taking certain personal property. The defendant pleaded that he had recovered judgment in the Court of King's Bench, in Canada, against one Smith, and that he had thereupon taken out a writ of *fieri facias*, which he caused to be levied upon the property in controversy in this suit, as the property of Smith, and that the property was duly sold, and its avails paid into court, by the sheriff's bailiff; that one Johnson then appeared, and claimed to be also a creditor of Smith, and demanded an apportionment of the avails of the property, and that the court thereupon ordered an apportionment; that there was a law of Canada, that when the proceeds of property sold on execution are thus paid into court, any person having any claim to the property may enter an appearance in court, and that if he neglect to do so, and judgment of distribution is rendered, as was done in this case, such judgment is conclusive, both as to the title of the property and the amount of damages and costs, and is a bar against all persons to any and all actions founded upon any title, claim, or possession in or to the property. The plaintiff replied that the property in question belonged to himself, and not to Smith, and that during all the time of the pendency of the proceedings in Canada he was a citizen and resident of the United States, and that he had no notice of such proceedings.

The court held, upon demurrer, that the proceedings in Canada could not be considered as *in rem*, and that the replication was a good answer to the plea.

We have sufficiently shown that judgments on foreign attachment cannot be considered as *in rem;* but we desire to illustrate the additional principle, by this case, that no country can by legislation make proceedings *in personam* conclusive against the world. The Legislature may declare such proceedings conclusive against all the citizens of the State; but unless they partake of the real character of proceedings *in rem*, as by being adjudications upon the *status* of a person or thing, they can have no effect beyond the jurisdiction of the State, except upon such non-residents as have been served with notice within the jurisdiction, or as have appeared in the case.

The books contain a multitude of cases of this class; but they

[1] *Ante*, pp. 11, 12.

[2] 20 Vt. 65.

are not distinguishable in principle, and seldom in fact, from the above. All agree that such judgments are conclusive between the parties as to the property within the jurisdiction of the State, but void as judgments *in personam*, unless founded upon personal service or appearance.[1]

The principle upon which these cases proceed is one of universal application, both as to judgments of the sister States of the Union, and those of foreign countries. It may be thus stated: The Legislature cannot give extra-territorial effect to any matters or proceedings, as judgments, which are not based on personal notice to or appearance by the defendant, and trial before a court of competent jurisdiction. These are elements necessary to the validity of every judgment *in personam* when under consideration in the courts of any other State or country.[2]

It is an important question, whether the judgments of a sister State may be attacked for fraud, in the courts of any other State. The books are not wanting in *dicta* in the affirmative;[3] but upwards of thirty years ago there was an express decision of the question in the negative, by the Supreme Court of Ohio.[4] The facts, as they appear in the report of the case cited, were these: The suit was debt upon a judgment recovered in Virginia. The defendant, in his first plea, pleaded, in general terms, that the judgment sued upon was obtained by fraud; and in the second and third pleas, the fraud relied upon was specially alleged. Issue of fact was joined upon the first, and a demurrer was entered to the second and third pleas. We quote at some length from the opinion of the court, delivered by Mr. Justice Grimke.

"It is remarkable," said he, "that this question has never received a precise determination. The books abound so fully in the general doctrine that fraud avoids all judicial acts, and the proposition is so often asserted in terms which import that a judgment

[1] Lincoln *v.* Tower, 2 McLean, 473; Westerwelt *v.* Lewis, Ib. 511; Steel *v.* Smith, 7 Watts & S. 447; Miller *v.* Miller, 1 Bail. 242; Chamberlain *v.* Faris, 1 Mo. 517; Wilson *v.* Niles, 2 Hall, 358; Watkins *v.* Holman, 16 Peters, 25; Barrow *v.* West, 23 Pick. 270; Whiting *v.* Johnson, 5 Dana, 390.

[2] Buchanan *v.* Rucker, 9 East, 192; S. C. 1 Camp. 65; Smith *v.* Nicolls, 7 Scott, 147; S. C. 5 Bing. N. C. 208; Becquet *v.* MacCarthy, 2 Barn. & Ad. 951; Vanquelin *v.* Bouard, 15 Com. B. N. S. 341; Meeus *v.* Thellusson, 8 Ex. 638. See also the authorities cited in the notes to the preceding pages.

[3] Holt *v.* Alloway, 2 Blackf. 108; Borden *v.* Fitch, 15 Johns. 121; Andrews *v.* Montgomery, 19 Johns. 162; Shumway *v.* Stillman, 4 Cow. 292. See Lucas *v.* Bank of Darien, 2 Stewt. 280.

[4] Anderson *v.* Anderson, 8 Ohio, 108.

may for that cause be impeached collaterally, that one would expect to meet with several cases in which the question has been directly adjudged. In Borden *v.* Fitch,[1] the defence was placed on the ground of want of jurisdiction, in the Supreme Court of Vermont, to decree a divorce; the defendant to the petition residing in another State, and having no notice of the proceedings. It is, however, *said* by the court, that as the decree was obtained by false and fraudulent representations, it was void; and Fermor's Case[2] is relied upon as the only authority. . . . . But it is important to examine Fermor's Case. It was a bill in chancery to annul a fine; that is, it was a proceeding, directly instituted, to get rid of a judgment at law. Richard Fermor, the plaintiff, demised land to the defendant, Thomas Smith, for twenty-one years. Afterwards Smith fraudulently levied a fine, to bar the plaintiff of the inheritance. And it appears to have been a great question then whether the plaintiff could be relieved, even in chancery; for it is said that it was debated two days, before all the judges of England, and the barons of the Exchequer, when it was finally determined in his favor. So that Fermor's Case, so far from being an authority in support of the position that a judgment may be impeached collaterally, is an authority the other way. . . . .

"With regard even to foreign judgments, there appears now to be the strongest inclination to depart from the doctrine that they are only *prima facie* evidence."

After referring to cases already considered, holding to the conclusiveness of foreign judgments,[3] he proceeds to say: —

"If such is the view which is now taken of the efficacy of foreign judgments, what shall we say of the attempt to impeach collaterally a judgment of a sister State, which has all the force and validity of a domestic judgment? That it cannot be vindicated either upon principle or authority, and that although loose *dicta* in abundance may be found to countenance it, yet that it has no root either in English or American jurisprudence."

The learned judge was mistaken in the statement that there had been no prior determination of the question at the time he decided this case. The point had been raised several years earlier in Massachusetts; and the same rule had been declared.[4] The

[1] 15 Johns. 121.

[2] 3 Coke, 77.

[3] Tarleton *v.* Tarleton, 4 Maule & S. 20; Boucher *v.* Lawson, Cas. Temp. Hardw. 89; Martin *v.* Nicolls, 3 Simons, 458.

[4] McRae *v.* Mattoon, 13 Pick. 53. See Homer *v.* Fish, 1 Pick. 435.

court in the case cited said that if this were not the law, there would be no end of litigation. If the first judgment were to be impeached for fraud, the second was liable to the same attack, and the third also, and so on. The law would become a game of frauds, in which the greatest rogue would become the most successful player. The doctrine of this case was recently held by the Supreme Court of Connecticut.[1]

There has been conflict also as to whether such a judgment may be restrained. In a case in the Court of Chancery of New York,[2] the complainant sought to restrain the defendants from prosecuting a suit in the Supreme Court upon a judgment recovered by them against the complainant, in Massachusetts. His bill alleged that the judgment referred to had not been entered, filed, or docketed, at the time alleged in the declaration in the Supreme Court, or for many years thereafter; that no verdict was ever rendered, and that there had been no assessment of damages; that the alleged judgment had been entered some three years after the time stated in the declaration, through the mistake or collusion of the clerk, and by the fraud and procurement of the defendants in the present suit, or their agents, without lawful warrant or authority. The bill was demurred to, and the demurrer sustained on appeal.

Chancellor Walworth said that if the judgment had been fraudulently entered, the proper remedy was an application to the court in Massachusetts to set it aside, and to take the spurious record off the files of the court. It would not be according full faith and credit to the record of a judgment rendered in another State, if the party against whom it purported to have been obtained should be allowed to show, in another State, that no such judgment was given, or authorized to be entered by the court, but that it had been fraudulently made up and filed.

The Supreme Courts of Connecticut and Georgia have recently declared a different rule;[3] and the Supreme Court of Iowa have made a decision not in harmony with this case.[4]

The Iowa case referred to was a suit upon a judgment rendered in Kentucky, in an action of slander. The court below, acting as a jury, found that the defendant, a resident of Kentucky when the suit for slander was begun, had removed to Iowa, after em-

[1] Sanford *v.* Sanford, 28 Conn. 6, 28.

[2] Bicknell *v.* Field, 8 Paige, 440.

[3] Pearce *v.* Olney, 20 Conn. 544; Engel *v.* Scheuerman, 40 Ga. 206. See Dobson *v.* Pearce, 12 N. Y. 156.

[4] Rogers *v.* Gwinn, 21 Iowa, 58.

ploying counsel to defend the case; that subsequently he appeared, but the cause was passed; that afterwards he saw the plaintiff, who then assured him that he would dismiss the suit, and that he, the defendant, need not come back from Iowa to defend the case any further; that the defendant, relying upon this assurance, left for his home in Iowa; and that the plaintiff a year later called up the case, in the absence of the defendant, and without notifying him, and obtained the judgment now sued upon. The judgment of the court below, upon these facts, was in favor of the defendant; and this judgment was affirmed in the Supreme Court.[1]

Mr. Justice Dillon, who delivered the opinion in the case, after stating that the circuitous practice of a bill in chancery to enjoin the action at law was no longer necessary, under the practice in that State, and that therefore if the facts pleaded were sufficient either in law or equity to constitute a defence, the plaintiff must fail, passed on to the main point in question. He said that the courts were in the constant habit of relieving parties on equitable terms from judgments rendered against them in consequence of the fraudulent acts of the successful party, or his attorney.[2] "If the judgment sued on," he continued, "had been rendered by a court in Iowa, the facts found by the court below would be a good defence, at least in equity, to an action upon it, or sufficient to require a court of equity, upon petition filed for that purpose, to cancel it. And we cannot doubt that they would be so regarded by the courts of Kentucky, if this action had been brought in that State, or if the defendant, in that State, had sought relief against the judgment. So that if we should hold as the appellant insists we should, we would be giving to the judgment of the court of one sister State a *greater* force and effect than we would give to a like judgment rendered by our own courts."

[1] In Luckenbach *v.* Anderson, 47 Penn. St. 123, — a suit upon a judgment rendered in New York, — the defendant, a resident of Pennsylvania, offered to prove that he had been deceived and decoyed into New York for the purpose of procuring service on him, and that service was thus, and not otherwise, effected. The court held that it was not sufficient to show that service had been obtained by fraud, but that the justice of the claim should have been denied; and that even both of these allegations might not have been sufficient, unless the judgment itself had been obtained by fraud.

See also Crawford *v.* White, 17 Iowa, 560; Potter *v.* Parsons, 14 Iowa, 286.

[2] He cited Harshey *v.* Blackmarr, 20 Iowa, 161; 5 Am. Law Reg. N. S. 389; 2 Story, Eq. §§ 194, 195; Pearce *v.* Olney, 20 Conn 544; Dobson *v.* Pearce, 12 N. Y. 156; Milne *v.* Van Buskirk, 9 Iowa, 558.

In a suit for an injunction against proceedings at law upon a judgment of a sister State, founded upon facts quite similar to those in the case just under consideration, the Supreme Court of Connecticut came to the same conclusion,[1] and sustained the injunction. The court said that this was no attempt to impeach the validity of the judgment of another State; that the court of equity did not presume to direct or control the court of law; but it considered the equities between the parties, and acted upon she person, restraining him from instituting or prosecuting the action.

But the question in its *legal* aspect has recently received an authoritative decision from the Supreme Court of the United States, the court of last resort in matters relating to the Federal Constitution and acts of Congress.[2] The court said that unless the merits were open to exception and trial between the parties, it was difficult to see how the plea of fraud could be admitted to the action upon a judgment of a sister State. Whether an action on such judgment could be restrained or not was not determined.

The *dicta* to the contrary may now be considered as overruled, and the doctrine established that judgments of one State cannot be avoided in another for fraud, while in full force where rendered, unless indeed the plea of fraud would there be good;[3] and as the same pleas would be good in a sister State that would be good in an action upon the judgment at home, it follows that if the judgment has been limited or restrained, as by injunction, in the domestic court, the fact may be pleaded, or perhaps a similar proceeding may be maintained, in any other State, when it is sought to enforce the judgment.[4]

But as has already been intimated, it is quite probable that a

[1] Pearce *v.* Olney, 20 Conn. 544. See Dobson *v.* Pearce, 12 N. Y. 156.

[2] Christmas *v.* Russell, 5 Wall. 290. See also Granger *v.* Clark, 22 Maine, 130; Boston & W. R. Co. *v.* Sparhawk, 1 Allen, 448; Atkinson *v.* Allen, 12 Vt. 624; Hammond *v.* Wilder, 25 Vt. 342; Embury *v.* Conner, 3 Comst. 522.

[3] Christmas *v.* Russell, *supra*, was based on the doctrine that fraud is no ground for the impeachment of a domestic judgment; and it would seem to follow from the doctrine of Hampton *v.* McConnell, 3 Wheat. 234, that if the law of any State is otherwise, and a plea of fraud good as to a home judgment, it would be good when pleaded to a judgment of such State in any other part of the Union.

[4] In one case it was held that chancery would restrain a party from proceeding at law upon a judgment of a sister State before he had made any attempt to enforce it; and this, too, though the attack was directly upon the merits of the case. Winchester *v.* Jackson, 3 Hay. 305; S. C. Cooke, 420. But this was clearly an erroneous view of the law.

different rule may prevail as to judgments rendered in foreign countries; for the rule in the American States, as we have seen, is founded upon the fundamental law of the land, which expressly applies only to the judgments of the sister States. In the *dicta* which we have referred to as sustaining the plea of fraud, the judges perhaps failed to notice the distinction between the two classes of judgments.

But suppose the plaintiff, instead of suing upon the foreign judgment, prefers to bring suit *de novo*, on the original cause of action: will the former judgment in his favor estop him? Let us, as heretofore, answer the inquiry by considering, first, the judgments of colonies and foreign countries, and, secondly, those of the sister American States.

This question was directly raised in the English Court of Common Pleas, in the year 1839, in the well-known case of Smith *v.* Nicolls.[1] This was an action on the case, for an unfounded charge, as alleged in the first count of the declaration, of illegal trading and seizure of the plaintiff's ship, the Admiral Owen. Among other things the defendant pleaded, substantially, that the plaintiff had impleaded him in the Vice-Admiralty Court of Sierra Leone, upon the same cause of action, and obtained judgment; and that this still remained in full force and effect. The issue was finally raised upon demurrer to a replication to this plea. Judgment was given for the plaintiff. Chief Justice Tindal said that the broad question was whether the plea of judgment recovered was such as to deprive the plaintiff of the right of suing in England upon his original cause of action, or whether it amounted to more than an agreement as to the quantum of damages. No case, he said, had been cited for the defendant, and none could be found, to show that a judgment of this kind stood upon the same footing as a judgment recovered in one of the superior courts of Westminster. The ground upon which a judgment recovered in the courts of England was held to be a bar was that the nature of the debt or demand was changed; the plaintiff had a higher remedy; he had a judgment of a court of record upon which an immediate execution might be issued, and consequently it would be very superfluous, and give encouragement to much useless litigation, and create unnecessary delay and expense, if he might commence *de novo*, and bring a second suit for the same debt or

[1] 7 Scott, 147; S. C. 5 Bing. N. C. 208.

ground of complaint. It had therefore always been held that where a plaintiff had obtained judgment in a court of record, whether in an action for debt or for damages, the original cause of action became merged or extinguished by the higher remedy.

The Vice-Admiralty Court, he stated, was not, in the first place, a court of record ; and its judgment could not be put upon higher ground than one obtained in a common-law proceeding of a colonial court, if as high. It was familiar to all that the only mode of proceeding upon such a judgment in England was by bringing an action upon it, in which action the judgment of the colonial court formed the evidence. The first ground of distinction, therefore, between such a judgment and a judgment of a court of record in England was, that upon the latter there was an immediate remedy by execution, whereas the former could only be enforced by having recourse to another action. He next referred to a possible ground of distinction in respect to the conclusiveness of domestic and foreign judgments, — a matter already sufficiently noticed. He then said: "If the judgment has not altered the nature of the rights between the parties, why is the plaintiff to be deprived of the right which every subject of her Majesty has, to sue in the courts of this country, for the debt due to or damage sustained by him? It appears to me that he has the option of suing upon his original ground of action, or bringing an action of *assumpsit* upon the foreign judgment." This was the line of argument advanced by the other members of the court; and the authority of the case has been uniformly followed in England.[1]

The same doctrine was held in Texas prior to the admission of that State into the Union.[2] And the court of Massachusetts hold that where judgment was rendered for the plaintiff in Canada, in a suit instituted subsequently to one brought in Massachusetts, for the same cause of action, a plea of the foreign judgment, if it has not been satisfied, is no defence.[3]

An examination of the American cases, however, shows a different rule in relation to the judgments of the sister States. Bank of the United States *v.* Merchants' Bank of Baltimore[4] is a leading

[1] Bank of Australasia *v.* Harding, 9 Com. B. 661; Robertson *v.* Struth, 5 Q. B. 941. See also the earlier cases of Hall *v.* Odber, 11 East, 118; Plummer *v.* Woodburne, 4 Barn. & C. 625; S. C. 7 Dowl. & R. 25; Obicini *v.* Bligh, 8 Bing. 335.

[2] Wilson *v.* Tunstall, 6 Tex. 221; Frazier *v.* Moore, 11 Tex. 755.

[3] Wood *v.* Gamble, 11 Cush. 8.

[4] 7 Gill, 415.

case. To an action of *assumpsit* in Maryland, the defendant pleaded as follows: "That the plaintiff ought not to maintain its action, inasmuch as the plaintiff, after the day of issuing forth the writ in this cause, that is to say, on the 31st day of March, 1842, in a certain court of record, called the District Court for the City and County of Philadelphia, in the State of Pennsylvania, impleaded the said defendants, in a plea of trespass on the case, for the not performing the same identical promises and undertakings, and each and every of them, in the declaration mentioned. That afterwards, to wit, on the 23d day of April, 1842, the plaintiffs, by the consideration and judgment of the said court, recovered on the said plea, against the said defendants, $ 159,676.20, for its damages, which it had sustained on the occasion of the not performing the same identical promises and undertakings in the declaration mentioned. And that the said judgment still remains in full force and effect, and not the least reversed, satisfied, or made void."

To this plea a demurrer was entered and sustained in the court below. After considering and overruling several objections to the form of the plea, as that it should have been pleaded *puis darrein continuance*, and should have alleged that the foreign court had jurisdiction, the court said: "And if it be true that the judgment possessed in the State where it was rendered the attribute of conclusiveness; that it had there the rank and dignity of a debt of record; that it was not re-examinable, and could not be controverted, with respect to the merits of the original demand; that the parties were precluded from going behind the judgment into an investigation of the original cause of action; and that by the act of Congress of the 26th of May, 1790, the same effect is to be attributed to the judgment by the courts of Maryland, when it is introduced into the tribunals of that State as evidence, or relied upon in pleading, to which it would be entitled in the State where it was pronounced; and that it has all the operation and force in Maryland that could be claimed for it in Pennsylvania, as conclusive in relation to the merits of the claim and the subject-matter of the suit, — it follows as an irresistible conclusion, upon the undoubted principles of the common law, that it must operate here as an extinguishment of the original demand.

"We think it therefore to be clear, upon the true exposition of the first section of the fourth article of the Constitution of the

United States, and the act of Congress passed in execution of the power granted by the Constitution, and the doctrine of extinguishment, as established by the common law, that the appellee could not have maintained an action of *assumpsit*, upon the cause of action exhibited in the record, if the judgment set forth in the plea had been obtained in Pennsylvania prior to the commencement of the suit." The court added that though the judgment in question was obtained after the present suit was instituted, the defendants were authorized in specially pleading the matter.[1]

In a similar action in Connecticut, the defendant pleaded a judgment against himself in New York; but it appeared upon the trial that an appeal from this judgment was pending. It was found that by the laws of the State of New York the appeal did not supersede the judgment, but that execution might issue thereon at any time, upon the application of the plaintiff.

Counsel for the plaintiff contended that the judgment was not final and conclusive in New York; that an action could not there be maintained upon it; and that a transcript of the record would show an appeal taken, a *lis pendens*, an imperfect judgment, which could not estop the parties. But the court, Storrs, C. J., said that the effect of the appeal depended upon the character of the jurisdiction of the New York court. If by the laws of New York a case carried before it by appeal is to be retried as upon original process, and it had jurisdiction to settle the controversy by a judgment of its own, and to enforce the same by its own process, the appeal, like an appeal under the Connecticut statutes from a justice of the peace to the superior court, would vacate the judgment of the inferior court. But if the appeal was in the nature of a writ of error, and only carried up the case for a correction of errors, and for an adjudication upon the question whether the judgment should be affirmed, reversed, or modified, and the court had only the corresponding powers, then such appeal would not vacate or suspend the judgment; and the removal of the case to a higher court would no more bar an action upon the judgment than the

[1] In McGilvray *v.* Avery, 30 Vt. 538, the defendant was sued simultaneously upon the same cause of action in New Hampshire and Vermont. Judgment having first been rendered in the former State, it was held that this was a bar to the further prosecution of the action in Vermont, though the mere pendency of the suit was not even ground for an abatement. Walsh *v.* Durkin, 12 Johns. 100; Hatch *v.* Spofford, 22 Conn. 485, cited by the court. See also Weeks *v.* Pearson, 5 N. H. 324; Embree *v.* Hanna, 5 Johns. 101.

pendency of a writ of error at common law. That such an action, under those circumstances, would not be barred, he said, was well settled.[1] The judgment was therefore in favor of the defendant.[2]

In the above cases the defendant was served with process or appeared in defence. Let us see what effect an opposite state of facts produces. In a case in New Hampshire, already referred to,[3] the plaintiff sued in *assumpsit*, and it appeared from facts agreed that a recovery in Maine upon the same cause of action had been obtained by the plaintiff against the same defendants. The record did not show any notice or appearance by either defendant; but it did state that one of them was a resident of New Hampshire. After holding that in such case there would be no presumption in favor of notice to or appearance by this non-resident defendant, the court reached the main question in the case, whether the judgment in Maine was an estoppel against the suit in New Hampshire, as to the last-mentioned party. Having shown that the judgment in question would be deemed invalid if an attempt were made to bring an action upon it in any other State, they said: "If the judgment is to be regarded as a mere nullity, when an attempt is made to enforce it by an action here, the question arises, must it not be considered equally a nullity when the defendants set it up as a bar or answer to an action upon the original note upon which that judgment was rendered? Can it be treated by one party as valid, while as it respects the other party, in reference to the same subject-matter, it is held to be void? Can it be said, when the action is brought here upon the judgment, that the original demand does not rest in judgment, for the reason that the judgment is void; while at the same time, if the action were brought upon the original demand, it may be legally asserted by the same party that the demand has passed into judgment, and that the action cannot be maintained for that cause? . . . .

"To maintain the position that, in the case of an action upon the judgment, the judgment is void, and may be so treated, but that when the action is upon the original demand, the same judgment is valid, is to maintain that the form and manner of the action adopted determine the character of the former judgment, its

[1] Case *v.* Case, Kirby, 284; Sloan's Appeal, 1 Root, 151; Curtiss *v.* Beardsley, 15 Conn. 523.

[2] See Scott *v.* Pilkington, 2 Best. & S. 11.

[3] Rangely *v.* Webster, 11 N. H. 299.

validity or invalidity, instead of the facts and circumstances attending its recovery." [1]

The rule then as to judgments rendered in the courts of the sister States of America is, that they are an estoppel to any suit between the same parties, upon the original and same cause of action, provided they are valid and conclusive where rendered, and based upon personal notice or appearance, otherwise not.[2] But in the case of judgments rendered in foreign countries, or in colonies or dependencies, there is no estoppel to a fresh suit for the same demand, where the same plaintiff recovered in the prior action.[3]

There is another rule which *seems* deducible from the cases, and that is, that if the judgment in question was given for the defendant, it will always be an estoppel, whether it was rendered in a court of a foreign nation, a colony, or a sister State, if it was final and conclusive there.[4]

It is perfectly clear that this should be true in the cases of judgments of our sister States, by reason of the constitutional provision and the act of Congress; but as to the other classes, why should judgment for the plaintiff cause no estoppel to a fresh suit, and the opposite rule prevail where it is in favor of the defendant? The distinction (bearing in mind the fact that the doctrine of merger does not here prevail) we conceive to be this: —

1. Any party may waive an advantage in his own favor, provided he does not thereby interfere with any of the rules of law. The plaintiff waives such an advantage when he elects to bring a fresh suit upon the original cause of action; and this without injury to

[1] The question had been determined the same way a few years earlier. Whittier *v.* Wendell, 7 N. H. 257. To the same effect is Kane *v.* Cook, 8 Cal. 449.

[2] Baxley *v.* Linah, 16 Penn. St. 241; Barnes *v.* Gibbs, 2 Vroom, 317; Brown *v.* Lexington & D. R. Co., 2 Beasl. 191; Rogers *v.* Odell, 39 N. H. 457; Child *v.* Eureka Powder Works, 45 N. H. 547; North Bank *v.* Brown, 50 Maine, 214; Cincinnati, &c. R. Co. *v.* Wynne, 14 Ind. 385; Lapham *v.* Briggs, 27 Vt. 26; Nichol *v.* Mason, 21 Wend. 339.

But the doctrine of extinguishment, which results from the Constitution and act of Congress, must be taken with some qualification. A judgment in one State cannot extinguish a judgment in another State. Weeks *v.* Pearson, 5 N. H. 324. In this case, the plaintiff had first brought his action in New Hampshire. He then sued in New York on the judgment there rendered. Not having satisfied the same, he sued again in New Hampshire, on the first judgment. The defendant pleaded in bar the judgment rendered in New York; but the court held the plea bad.

[3] But it is held in Louisiana, under the code, that a judgment of a foreign country extinguishes the original cause of action, so that suit must be brought upon the judgment. Jones *v.* Jamison, 15 La. An. 35.

[4] Frayes *v.* Worms, 10 Com. B N. S. 149; Plummer *v.* Woodburne, 4 Barn. & C 625; S. C. 7 Dowl. & R. 25.

the rights of the defendant. He risks losing his case, without the power, it would seem, of proving a larger claim than the amount for which the former judgment was rendered.[1] We speak, of course, of a judgment valid by the law of nations, i. e. one rendered before a court of competent jurisdiction; for if the judgment were void, it would be no estoppel, and of course could have no influence upon the quantum of damages. And in the case of a valid judgment, the reason why he could prove no more than the sum recovered in the foreign suit is that this would be to discredit the foreign judgment upon the merits; and this could not be done against the objection of the defendant, as we have seen. The foreign court has said that the plaintiff is entitled, for instance, to $ 1,000; and to allow him to prove a larger debt would be to say that the court abroad had not properly adjudicated upon the claim. It is quite clear, then, that while the plaintiff waives his rights, he does not endanger those of the defendant.

2. If the foreign judgment in favor of the defendant were not a bar to another suit by the plaintiff upon the same demand, the effect would be to allow the merits to be opened again, and thus to render a contrary decision possible. This would be endangering the rights of the defendant, and violating a rule of law. The plaintiff may waive his own rights, as when the foreign judgment was in his own favor, and incur the hazard of a judgment in favor of the defendant; but he cannot waive his adversary's rights, and force him to try the question again.

It is immaterial what may be the plaintiff's motive in suing *de novo*, instead of suing upon the judgment. Though, as in the case supposed, it may be perfectly valid, he may still have doubts upon the matter and prefer to bring a fresh suit; but whatever his motive, he waives an advantage and hazards his cause, without injury to his adversary; and he violates no rule of law.

We have already mentioned several matters as to which the rules of law are common to all the classes of foreign judgments, such as these: that in proceedings *in rem*, the judgments of courts of competent jurisdiction are conclusive of the change of property; and that as to proceedings *in personam*, only such judgments as are founded upon personal notice or appearance are held conclusive. There are also other matters to be noticed, in which the same principles prevail in the three classes of foreign judgments. We

[1] Smith *v.* Nicolls, 7 Scott, 147, 166, Tindal, C. J.

proceed to notice some of the rules in proceedings by garnishment, or trustee process.

The doctrine, as generally declared, is that where a debt or demand has been recovered by garnishment in a foreign court, the recovery is a protection to the garnishee or trustee against his original creditor.[1]

A case before Lord Mansfield involved this principle.[2] Le Chevelier was assignee in bankruptcy of one Dormer. A creditor of Dormer, to whom he (Dormer) was indebted before the bankruptcy, attached a sum of money in the hands of one Lynch, a debtor of Dormer, after the bankruptcy. After this Lynch came to England, whereupon Dormer's assignee brought the present action against him, to recover the debt owing by him to the bankrupt. The assignee contended that as the debt for which the money was attached was due before the bankruptcy, the foreign creditor was only entitled to his share of the dividend under the commission of bankruptcy, and could not attach the money in the hands of Lynch, because the right to the money owing by Lynch was vested by the assignment in him, the assignee, for the benefit of all the creditors. But Lord Mansfield, while admitting the proposition to be true generally, said that if after the bankruptcy, and before payment to the assignee, money owing to the bankrupt, out of England, was attached, *bona fide*, by regular process, according to the law of the place, the assignee could not recover the debt.

Among the American cases, Hull *v.* Blake[3] is a leading one. In that case a *bona fide* indorsee of a note, made in Georgia, brought an action in Massachusetts against the maker thereof. The defendant pleaded that he had been summoned as garnishee of the payee of the note, in a suit in Georgia by a creditor of the payee; that he had answered that he owed the note in question; and that judgment had thereupon been rendered against him, in which it was declared that the same should operate as a bar in favor of the garnishee against the plaintiff, or his indorsee. The indorsement had been regularly made to the present plaintiff before the proceedings by garnishment were instituted. Counsel for

[1] Taylor *v.* Phelps, 1 Har. & G. 492, 502; Le Chevelier *v.* Lynch, 1 Doug. 170; Phillips *v.* Hunter, 2 H. Black. 402; Holmes *v.* Remsen, 4 Johns. Ch. 460; S. C. 20 Johns. 229; Embree *v.* Hanna, 5 Johns. 101; McDaniel *v.* Hughes, 3 East, 367; Wilkinson *v.* Hall, 6 Gray, 568; Barney *v.* Douglas, 19 Vt. 98; Kimball *v.* Gay, 16 Vt. 131; Chase *v.* Haughton, Ib. 594.

[2] Le Chevelier *v.* Lynch, 1 Doug. 170.

[3] 13 Mass. 153.

the plaintiff urged that, this being the fact, the defendant had ceased to be the debtor of the payee, i. e. the indorsement having been made to the plaintiff before the garnishment, the payee's interest had been passed away, so that there was nothing for the process to operate upon; and that the courts of Georgia could not construe their statutes in such a way as to injure the citizens of other States. The statute of Georgia does not seem to have been before the Massachusetts court.

Parker, C. J., said that if by the laws of Georgia in force when the note was made, payment to the payee, after indorsement, would discharge the same, and such payment were actually made, proof of these facts would protect the defendant from a second suit, though brought by an innocent indorsee who had paid value for the note. Such a law would be extraordinary, but if it existed it must prevail, since the law of the country where the contract was made would govern its performance. "The question then," he continued, "in the present case, would seem to be whether such was the law of Georgia with respect to a negotiable promissory note at the time this contract was made. That it was, the evidence resulting from the judgment of the court of that State, which had the jurisdiction of the subject-matter, is perhaps conclusive. At least it ought to be so considered in favor of a party who has been there concluded by it, and has no means of avoiding the execution of it; unless it should be made to appear that he aided in the procurement of such a judgment by withholding facts essential to the right determination of the court. In this case a true disclosure appears to have been made; and although the law of this State would not authorize a similar judgment upon similar facts, the law of Georgia may be different, and must be presumed to be so; because a judicial court of that State, of competent jurisdiction, has so declared it."[1] He then ruled that it was unnecessary for the defendant to have taken the opinion of the court of last resort in Georgia, and that a judgment, fairly rendered, would protect him as well as if actually satisfied.

In a subsequent case in the same State,[2] involving the same general question, it appeared that no execution had issued against the garnishee in the sister State; and an examination of the stat-

[1] The foreign judgment itself is the highest evidence of the law; and it is not permissible to give other evidence of what the law is. Davidson v. Sharpe, 6 Ired. 14.

[2] Meriam v. Rundlett, 13 Pick. 511.

ute of the State having convinced the court that the judgment operated only as a lien on the fund (a promissory note) in the hands of the garnishees, and that even that was provisional, to take effect only in case other funds, first chargeable, should prove insufficient to pay the debt, it was held that the defendants' plea of the judgment against themselves as garnishees was no bar. Shaw, C. J., said that, upon general principles, one who had not yet been compelled to pay, and who might never be obliged to pay to another the debt attached, seemed in no condition to deny the original creditor's right to recover his debt absolutely and forever, though he might have good right to insist that proceedings should be stayed while his hands were tied. But it is evident that these remarks must be taken in strict application to the facts in this case, as above stated, and not as declaring a general rule; for a rule like this would seem to cover the case of an ordinary judgment, operating directly and wholly upon the particular fund attached, when not followed by execution. In such a case the garnishee has not been compelled to pay, and perhaps may never be; but still, according to the case above referred to,[1] which is cited as authority on this point in the case under consideration, such judgment would protect the defendant. The distinction between the cases seems to come to this, that in the earlier case the garnishee was certain to be compelled to pay the note; while in the latter case it was quite uncertain whether he would ever be required to pay at all, and it was probable in any event that he would be obliged to pay only a portion of the amount of the note.

In a case in the Supreme Court of New York,[2] — a suit against the maker of an unnegotiable promissory note, — the defendant pleaded judgment in Vermont against him as garnishee of a creditor of the plaintiff; to which the plaintiff replied that, before the suit in Vermont was brought, he had assigned the note to A. and L., for whose benefit the present suit was prosecuted. The court held that the replication would have been good had it averred that the debt was assigned for a valuable consideration; the suit being prosecuted in the interest of the assignees, who were not before the court in Vermont, and were not parties to the proceedings there. The court would presume that the rights of the assignee would have been recognized and protected had the assignment been known at the trial in Vermont. The proceedings

[1] Hull v. Blake, 13 Mass. 153.

[2] Prescott v. Hull, 17 Johns. 284.

were therefore *res inter alios acta;* and it was not drawing them into question to hold that the assignees were not concluded.

In respect to the doctrine of privity, the question has frequently arisen, whether the relation exists between administrators of different countries, of the same person's estate, so as to make a judgment *in favor of* an administrator or executor, in one country, an estoppel to a suit against another in another country; or whether judgment *against* an administrator or executor in one country may be a ground of action, and therefore an estoppel on the merits, against another in another country.

The case of Stacy *v.* Thrasher [1] was a demurrer to an action in Louisiana upon a judgment rendered in Mississippi, against an administrator appointed under the laws of that State; the action in the former State being brought by the same plaintiff against the Louisiana administrator of the same intestate. To use the language of the court, Grier, J., the question was: "Will an action of debt lie against an administrator in one of these United States, on a judgment obtained against a different administrator of the same intestate appointed under the authority of another?"

After showing that the action could not be maintained in the case of a judgment rendered in a foreign country, he proceeds to consider the particular case before him of a judgment of a sister State. He says: "The parties to these judgments are not the same. Neither are they privies.[2] . . . . Privies are divided by Lord Coke into three classes: first, privies in blood; second, privies in law; and, third, privies by estate. The doctrine of estoppel, however, so far as it applies to persons falling under these denominations, applies to them under one and the same principle, namely, that a party claiming through another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir who is privy in blood would be estopped by a verdict against his ancestor, through whom he claims. An executor or administrator, suing or sued as such, would be bound by a verdict against his testator or intestate, to whom he is privy in law. . . . .

"An administrator, under grant of administration in one State, stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other in law or in estate. They receive their authority from different

[1] 6 How. 44.

[2] 1 Greenl. Ev. § 523.

sovereignties, and over different property. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts, as in the case of an administrator *de bonis non*, who may be truly said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties.[1] . . . .

"A judgment may have the 'effect' of a lien upon all the defendant's lands in the State where it is rendered, yet it cannot have that effect on lands in another State, by virtue of the faith and credit given to it by the Constitution and act of Congress. The laws and courts of a State can only affect persons within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another State is *res inter alios acta*. It cannot be even *prima facie* evidence of a debt; for if it have any effect at all, it must be as a judgment, and operate by way of estoppel."

The doctrine of this case is well settled.[2] And the *dictum* expressed by the court, that an executor in one State and an administrator *de bonis non*, with the will annexed, in another State, are in privity, so that a judgment in favor of the former may be a ground of action in favor of the latter, has been directly adjudged, upon thorough consideration.[3] Such judgment must then be conclusive, in accordance with principles already considered; and judgment against the one would seem also to be conclusive against the other.[4] So in the case of executors appointed under the same will in the same State; they are in privity, it is said, and the principles of estoppel apply;[5] but the case just cited establishes a contrary rule in the case of executors qualified in different States.[6] The court in Hill *v.* Tucker, cited in the note, readopt the language quoted from Stacy *v.* Thrasher, and say that for the same reasons they hold that a judgment against an executor appointed

[1] Yare *v.* Gough, Cro. Jac. 3; Snape *v.* Norgate, Cro. Car. 167; Dykes *v.* Woodhouse, 3 Rand. 287.

[2] See Dent *v.* Ashley, Hempst. 54; Taylor *v.* Barron, 35 N. H. 484; Grout *v.* Chamberlin, 4 Mass. 613; Talmadge *v.* Chapel, 16 Mass. 71; Pond *v.* Makepeace, 2 Met. 116; Low *v.* Bartlett, 8 Allen, 259; Hill *v.* Tucker, 13 How. 466; McLean *v.* Meek, 18 How. 16; Rosenthal *v.* Renick, 44 Ill. 202; Latine *v.* Clements, 3 Kelly, 426.

[3] Latine *v.* Clements, *supra*; Hill *v.* Tucker, *supra*.

[4] Stacy *v.* Thrasher, 6 How. 44, 60.

[5] Hill *v.* Tucker, *supra*.

[6] See also Jackson *v.* Tiernan, 15 La. 485.

in one State would not be conclusive against another qualified in another State. And the same is true of trustees appointed by court to receive legacies for minors and an administrator of the same estate qualified in another State; there is no privity between them.[1]

Judgments of Foreign Courts of Inferior or Limited Jurisdiction.

We have hitherto had under consideration the judgments of superior courts, or courts of record, of other States and countries; the judgments of courts of the sister States, of limited jurisdiction, particularly those of justices of the peace, remain to be examined. Are these within the Constitution and act of Congress as to conclusiveness? The question has been answered both in the affirmative and in the negative.

The point arose in 1824, in the Supreme Court of Massachusetts.[2] The case cited was an action of debt upon a judgment rendered before a justice of the peace, in Connecticut. The question raised by the pleadings was whether the judgment declared on was conclusive evidence of debt, so as to admit of no inquiry into the merits of the demand upon which it was founded. The court, Parker, C. J., said that it was perfectly clear that the Constitution settled only this, that the acts, records, and judicial proceedings, authenticated as Congress should prescribe, were to be received as conclusive evidence of the doings of the tribunals; and it was equally clear that the *effect* of such acts, etc., was to be determined by Congress. The act of 1790, said the chief justice, prescribed the mode of authentication, and in the opinion of the court had not determined the effect of judgments of the sister States; but upon this point they yielded rather "to the authority than to the reasons" of the court at Washington. "Certainly we think," continued Chief Justice Parker, "the judicial proceedings referred to in the Constitution were supposed by the Congress which passed the act providing the manner of authenticating records, to have related to the proceedings of courts of general jurisdiction, and not those which are merely of municipal authority;[3] for it is

[1] Low *v.* Bartlett, 8 Allen, 259; Rosenthal *v.* Remick, 44 Ill. 202.

[2] Warren *v.* Flagg, 2 Pick. 448.

[3] The act of May 26, 1790 (1 Stat. at L. 122), reads as follows: "That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal,

required that the copy of the record shall be certified by the clerk of the court, and that there shall be also a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This is founded upon the supposition that the court whose proceedings are to be thus authenticated is so constituted as to admit of such officers; and the act has wisely left the records of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced for the purpose of being carried into effect. Being left unprovided for by the Constitution or laws of the United States, they stand upon no better footing than foreign judgments, being not more than *prima facie* evidence of debt."

A few years later the Supreme Court of New Hampshire adopted the same rule, upon a similar issue.[1] The court, Richardson, C. J., said: "We suppose it to be clear that until the record is duly authenticated in the manner Congress has prescribed, the judgment can stand on no better ground than any other foreign judgment. But such is the nature of the mode prescribed in the statute of the United States for the authentication of records, that in our opinion the record of a justice of the peace cannot be so authenticated, and that therefore the judgment of a justice of the peace is not within those provisions."

This doctrine is maintained in the more recent case of Taylor *v.* Barron, just cited, in regard to the conclusiveness of a decision given by commissioners appointed by a court of probate in a sister State. The plaintiff in that case brought an action of assumpsit in New Hampshire against an administrator, who pleaded that the alleged claim had been preferred before commissioners in Vermont, appointed by a court of probate, of competent jurisdiction, and by them rejected; and that by the laws of Vermont the decision was a final and conclusive judgment, forever barring the plaintiff.

together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken." The act of March 27, 1804 (2 Stat. at L. 298), extended these provisions to "all records and exemplifications of office books . . . . not pertaining to a court."

[1] Robinson *v.* Prescott, 4 N. H. 450. The doctrine reaffirmed, Mahurin *v.* Bickford, 6 N. H. 567; Taylor *v.* Barron, 30 N. H. 78.

Remarking upon the subject of the dependence of a judgment of another State upon the mode of its authentication for its force and effect, Mr. Justice Bell said: "It was natural that the National Legislature should be of the opinion that there might be tribunals, in some of the States, of such limited powers that it would be proper to leave their decisions to be dealt with at common law. And the fair construction of the act of Congress seems to us to make precisely that exception. It prescribes a mode of proof which implies that there must be a clerk and a judge, chief justice, or presiding magistrate; while it must have been well known that justices of the peace, and many other inferior tribunals, have no clerk, and many public boards, exercising judicial powers, have no officer that can, with any propriety, be denominated a judge or presiding magistrate. The omission to provide for cases of these classes, it seems, must have been intentional. And when the act provides that the records and judicial proceedings, *authenticated as aforesaid*, shall have faith, etc., it evidently designs to omit and leave unprovided for the proceedings of such courts as did not admit of such authentication." But the plea in the case did not show that there had been a trial on the merits of the claim, or that there was a trial at all; and on this ground it was overruled. The court refrained from expressing an opinion as to whether it would have been a good plea, if it had alleged a trial on the merits. To make the plea effectual, the court said that it should at least have shown that there had been an adjudication, sustaining a defence to the claim, which in its nature would be equally a defence in New Hampshire.[1]

The court of South Carolina has also declared that judgments of justices of the peace of sister States are *prima facie* evidence. The question, however, was not as to their conclusiveness, but whether they were evidence at all, and a proper ground of action.[2]

The same doctrine was declared in Vermont in the early case of

[1] It had been held in an earlier case in the same State, that where a party, a citizen of New Hampshire, presented a claim to the commissioner of an insolvent estate in Vermont, where the intestate resided, and the administrator having appealed from the commissioners' decree allowing the same, the case had been tried on its merits, and judgment finally rendered in the Supreme Court of Vermont in favor of the administrator, that that judgment constituted a good defence to the same claim by the same party; and that an ancillary administrator in New Hampshire might plead such judgment in bar of the allowance. Goodall *v.* Marshall, 14 N. H. 161.

[2] Clark *v.* Parsons, Rice, 16; Lawrence *v.* Gaultney, Cheves, 7. See also Snyder *v.* Wise, 10 Barr, 157.

King *v.* Van Gilder.[1] But this case has been overruled, and the courts of that State now hold that the judgments rendered in other States by justices of the peace, acting within their jurisdiction, are conclusive.[2] In Starkweather *v.* Loomis, the court say: "When the subject came to be examined upon principle, and in connection with the statutes that give large jurisdiction to justices, this court felt constrained to decide that, though a justice has no clerk, yet where the law requires him to keep records, he must be considered as his own clerk; and if he has no seal, he may use a common seal, or may certify that he has no seal of office, as an excuse for omitting to attach one to his copies of record."

What the doctrine in New York is, does not appear to have been determined. In the case of Thomas *v.* Robinson,[3] in which a question of the proper way of showing the jurisdiction arose, the court remarked that in order to prove what faith and credit should be given to a judgment rendered by a justice of the peace, in another State, it would be necessary to produce and prove the authority under which they were organized and proceeded. But this language was evidently used in reference to the question of jurisdiction.[4]

A decision to the same effect, as to the conclusiveness of justices' judgments of other States, that this must depend upon the law creating the courts, was recently made in Texas.[5] The meaning of this evidently is, that they will be accorded the same force and effect in Texas which they receive at home, upon producing and proving the law of the States. And the court of Ohio have, in a *dictum*, maintained the doctrine that such judgments are not subject to examination in the courts of other States.[6] In a subsequent case,[7] this question was raised by a demurrer: What is the character of a debt evidenced by a transcript of a judgment rendered by a justice of the peace of the State of Indiana? The court, after citing the case of Silver Lake Bank *v.* Harding, just referred to, as authority for the doctrine that a justice's judgment was a judicial proceeding, entitled to full faith and credit, said that the debt founded upon the transcript of the judgment should therefore be regarded as of the same character which it would have in

[1] D. Chip. 59.

[2] Starkweather *v.* Loomis, 2 Vt. 573; Blodget *v.* Jordan, 6 Vt. 580; Carpenter *v.* Pier, 30 Vt. 81.

[3] 3 Wend. 267.

[4] See also Cole *v.* Stone, Hill & D. 360.

[5] Beal *v.* Smith, 14 Tex. 305.

[6] Silver Lake Bank *v.* Harding, 5 Ohio, 545

[7] Stockwell *v.* Coleman, 10 Ohio St. 33.

Indiana; if it had the conclusive character of a judgment of a court of record there, it must receive the same consideration in Ohio.

Aside from judicial construction of the act of Congress on this subject, it seems quite clear to us that Congress must have intended the judgments of inferior courts, not of record, by the expression "judicial proceedings," in connection with the context. The act to which we refer[1] relates only to proceedings of the courts. The language is: "That the records and judicial proceedings of the courts of any State shall be proved . . . . by the attestation of the clerk and the seal of the court, *if there be a seal*," etc. The word "records" then can only mean the memorials of the superior courts, or courts of record. The words "judicial proceedings" follow in the conjunctive, and not in the disjunctive; so that they must mean something additional to the idea conveyed by the word "records." The only other class of courts being those usually denominated "inferior," it follows that they must have been intended. The position is fortified by the presence of the words above italicized, "if there be a seal," which all courts of record have.[2]

Now the second part of the act declares that "the said records and *judicial proceedings*" shall have the same force and effect as in the State from whence they are taken. It is plain that if as "judicial proceedings" the judgments of inferior courts are embraced by the language concerning authentication, in the first half of the act, they also fall within the meaning of the last half of the act concerning the effect to be given the judgments of the sister States.

But if the position taken by some of the courts be correct, that judgments of justices of the peace cannot be authenticated in the manner prescribed in the act of Congress, and that therefore they cannot be embraced in either part of it, we answer then, that by the Constitution "the acts, records, and judicial proceedings" of each State are entitled to "full force and effect" everywhere else in the Union. Judgments of inferior courts must be embraced in this broad language;[3] and "full force and effect" can mean nothing

[1] May 26, 1790 (1 Stat. at L. 122).

[2] It seems to us that there is no good ground for the objection that judgments of justices of the peace cannot be authenticated in the manner prescribed. A seal is not required; the justice may act as his own clerk, as was suggested in Starkweather v. Loomis, 2 Vt. 573; and there can be no impropriety in denominating him "judge."

[3] The clause in the Confederation, from which the one in the Constitution was taken, contained, after "judicial proceed-

less than the force and effect which would be given in the domestic courts.

It is quite certain, however, that the judgments of all courts, whether of record or not, which possess the necessary machinery for carrying out the act of Congress in regard to authentication, are conclusive of the merits, when properly authenticated.

Under this head of judgments of courts of inferior jurisdiction may be classed those of foreign consuls.

In Forbes *v.* Scannell,[1] it appeared that after an execution of an assignment, in Canton, China, before a United States consul, a controversy arose before the consul between the assignees and a citizen of the United States, residing in Canton, in which was involved the question of the validity of the assignment. The consul delivered an opinion holding the assignment valid. At the time of the assignment certain goods belonging to the insolvents were at sea; and upon their arrival in port they were seized on execution by third parties, who were aware of the claim of the assignees. These third parties, in a suit to recover damages for the seizure of the goods, now maintained that the assignment was void. The assignees however contended that this question had been conclusively settled by the decision of the consul.

In reply to this point the court, Baldwin, J., said: "It is urged that the decision of this court is as conclusive of the questions of local law decided, as would be that of any other court as to the law of its jurisdiction; but it seems that an appeal lies from the consul to the United States commissioner.[2] And we are not aware that the rule which accords the force of definitive exposition of the local law to the decision and judgment of the courts of the local jurisdiction has ever extended so far as to give that sanction to the judgment of a subordinate tribunal of the municipality or territory. The decision of the consul is doubtless entitled to some weight; but we are not prepared to hold it as conclusive of the general question adjudicated by him."

ings," the words, "of the courts and magistrates of every other State"; and these words were probably stricken out as redundant. It is plain from the fact that the word "courts" was stricken out as well as "magistrates," that no distinction was intended to be drawn between the judgment of the superior and those of the inferior courts, by the framers of the Constitution, in omitting the phrase referred to in the Confederation.

[1] 13 Cal. 242.

[2] A similar fact in Bank of Australasia *v.* Nias, 16 Q. B. 717, is mentioned as having force in favor of the conclusiveness of the judgment.

But the case is different where the statute has given such courts the necessary authority to try certain causes; and in such case a judgment for the defendant, if final and conclusive where rendered,[1] or for the plaintiff with satisfaction, will bar all further litigation for the same cause of action in the domestic courts, if the consular court acted within its jurisdiction.[2]

The jurisdiction of inferior courts of the sister State may in all cases be examined,[3] unless perhaps they are made courts of record, as they are in some States. In such case it is probable that the rules pertaining to the jurisdiction of superior courts prevail. An adjudication of jurisdiction would also probably make an exception.[4]

[1] So it would seem from analogy to the judgments of colonial courts. See Plummer *v.* Woodburne, 4 Barn. & C. 625.

[2] Barber *v.* Lamb, 8 Com. B. N. S. 95.

[3] Wheeler *v.* Raymond, 8 Cow. 311; Denning *v.* Corwin, 11 Wend. 647; Smith *v.* Fowle, 12 Wend. 9; Thomas *v.* Robinson, 3 Wend. 267; Cleveland *v.* Rogers, 6 Wend. 438; Sheldon *v.* Hopkins, 7 Wend. 435; Pelton *v.* Platner, 13 Ohio, 209; Foster *v.* Glazener, 27 Ala. 391; Gunn *v.* Howell, Ib. 663; Shivers *v.* Wilson, 5 Har. & J. 130; Thatcher *v.* Powell, 6 Wheat. 119; Shufeldt *v.* Buckley, 45 Ill. 223; Draggoo *v.* Graham, 9 Ind. 212; Cone *v.* Cotton, 2 Blackf. 85, note; Martin *v.* Kennard, 3 Blackf. 430; Grant *v.* Bledsoe, 20 Tex. 456; Beal *v.* Smith, 14 Tex. 305.

[4] Gunn *v.* Howell, 35 Ala. 144; Wyatt *v.* Rambo, 29 Ala. 510.

PART II.

ESTOPPEL BY MATTER OF DEED.

CHAPTER VII.

IN GENERAL.

WE enter now upon the consideration of a class of estoppels totally distinct from those we have been considering in the preceding pages, — so distinct that, so soon as we descend from the general idea — that of an indisputable admission — pervading all estoppels into the details of the subject, we shall only be able, in many cases, to trace the resemblance of the two classes by remote analogies. And even in respect to the general connecting link between them, there is a wide difference as regards the character of the operation by which the indisputable admission is made. In the case of a judgment or verdict estoppel, the question in dispute is submitted to others to decide;[1] in the case of estoppels by deed, however, the parties transact the whole business themselves, and agree between themselves upon the facts that shall thenceforward be unquestioned. The one case arises from the judgment of the law; the other from the contract of the parties.

An estoppel by matter of deed[2] may be defined to be a preclusion against the competent parties to a valid sealed instrument, and their privies, to deny its force and effect by any evidence of inferior solemnity. Lord Mansfield, giving the definition a more general form, and putting it into the shape of a rule of law, thus states it: "No man shall be allowed to dispute his own solemn deed."[3]

Taking this definition and rule as the premise, we propose, in considering the subject before us, to make two short general divisions, and to show,

1. To whom the doctrine applies;
2. To what it applies.

[1] In the case of a judgment against the defendant, the whole proceeding, of course, as well as the result, is *nolens volens* as to him.

[2] Though Lord Coke mentions this class as estoppels in *writing*, it is evident he means by *deed*. See Stratton *v.* Rastall, 2 Term, 366; Lampon *v.* Corke, 5 Barn. & Ad. 606, 611.

[3] Goodtitle *v.* Bailey, 2 Cowp. 597.

It is obvious that under the first division we must present the doctrine in its relation, *first*, to parties; *secondly*, to privies. Under the second division we propose to show, *first*, the limitations of the doctrine; *secondly*, the force of the doctrine as to recitals; *thirdly*, its force as to certain legal inferences arising from the joint execution of a deed; *fourthly*, its force as to after-acquired estates, or estates by estoppel; and, *fifthly*, its force as to the release of dower.

The relation of landlord and tenant, and the like, so far as the estoppel upon the tenant is concerned, being for the most part equitable, will be considered under Part III., "Estoppel by Matter *in pais*." The subject will, however, be incidentally presented, as occasion may require, in the present Part II., and particularly under Estates by Estoppel.[1]

First, then, concerning the doctrine of estoppels by deed in relation to parties and privies.

[1] Pages 294, 327 – 334.

CHAPTER VIII.

PARTIES AND PRIVIES.

THE general rule upon this subject is the same as in the case of estoppels by record, namely, that only the parties to a deed and those in privity with them can be bound by, or take advantage of, the estoppel created by the instrument. We proceed now to explain the meaning and operation of this rule as to

1. *Parties.*

The doctrine is illustrated by a case which recently came before the Supreme Court of Pennsylvania.[1] The action was ejectment by Struthers against one Clark and his tenants. It appeared that Clark, being owner of the land in question, conveyed it by deed to certain persons, some of whom subsequently joined in a mortgage with him to a *stranger*, which mortgage contained a recital that he (Clark) was the owner of eleven twenty-fourths of the land. Before this mortgage was recorded, but after its execution, the property was attached and sold on execution to the plaintiff. The tenants now alleged that Clark had no title when the attachment was served; to which the plaintiff replied the recital in the mortgage as an estoppel. But the court held the defence of the tenants good.

Mr. Justice Agnew, in delivering the opinion of the court, said: "There was an interval of time between the date of the last deed and the date of the mortgage, during which the tenancy was wholly gone. How was the tenancy revived? Only by the simple declaration of Clark that he owned eleven twenty-fourths, and the declaration or certificate of his co-mortgagors to the same fact. Thus the mere written certificate, as it were, of persons who were neither parties nor privies in estate, or in the suit brought to recover the estate, is made evidence to reinvest Clark with title to these eleven parts; and even more, it was laid upon the jury with a binding instruction, on the ground that it operated as an estoppel

[1] Sunderlin *v.* Struthers, 47 Penn. St. 411 (1864).

upon persons who, after Clark had parted with his title, stood in no relation or privity to him. . . . . On what principle of evidence or law his naked declarations, or those of a stranger, could be used, first, to renew or restore the tenancy, and then to estop, it is difficult to perceive. The effect of it is to let into possession one who has shown no title whatever, contrary to the first principle of the law of ejectment, and thus to oust persons holding no fiduciary relation, and thereby to affect the title of Clark's vendees, who, after their deeds, became the landlords."[1]

Persons acting under the authority of a grantee by deed are not regarded as strangers.[2] In the case cited, one Osgood had executed a deed of land to a corporation styled the "Proprietors of the South Chapel in Fryeburg." In this deed it was stipulated that a church should be erected on the land "for the use of the Methodist Episcopal society so long as they shall furnish preachers acceptable to a majority of the proprietors." The church was built, and, after having been occupied for a number of years, was suffered to fall into decay and disuse. After a considerable interval, the church was repaired by the defendants, under the direction of persons acting as the superintending committee of the proprietors, and reoccupied; whereupon the heirs of Osgood brought the present action of trespass for the entering and repairing the church. The defendants alleged the deed as an estoppel; while the plaintiffs contended that they were strangers, and not entitled to take advantage of it. The court decided in favor of the defendants, saying that it could not be maintained that they, acting under persons who were at all events *de facto* the superintending

[1] Mr. Justice Strong, in a concurring opinion, forcibly replied to the argument of the plaintiff, that it was a case of estoppel *in pais*. "Nor was the recital," he said, "an admission or declaration made to the plaintiff at the time of the sale, or at any previous time. He was not a party to the mortgage. It was altogether *res inter alios acta*. If he saw it, and did not know it was a mistake or a falsehood, still he was not warranted in relying upon it. I agree that if the plaintiff had been induced to purchase by anything said by these mortgagors at the sale, or by representations made by them to him previously, they would have been bound by their declarations, and precluded from averring the contrary to the prejudice of his title. But it is an unprecedented extension of the doctrine of equitable estoppel to hold that a man is bound to the world to make good what he has said to any one, if others choose to rely upon it. If every man may be held liable, not only to parties and privies to his deed, but to all mankind, to make good every introductory recital which the deed contains, it behooves him to avoid all recitals, and be careful what scrivener he employs. Such is not the law, and there are no authorities which assert it."

[2] Osgood *v.* Abbott, 58 Maine, 73.

committee of the proprietors, a majority of whom were among the original associates and proprietors, were such strangers and wrong-doers as to deprive them of the right to assert the estoppel.

This doctrine is also illustrated by a late case in Ohio.[1] An action had been brought for the assignment of dower in land which the defendant held under a sheriff's deed, made by virtue of an execution against the plaintiff's late husband. The defendant sought to protect himself under a deed from the deceased and release of dower, made before the sheriff's sale, but after the judgment, to third persons. The court refused to allow the alleged defence to be made.

The defendant, the court observed, had never possessed himself of the title which he relied upon; he did not claim under it, but by a title adverse to it and paramount. He could not make the release available as a grant, for he was not a party to it; nor could the release operate in his favor by way of estoppel, for a stranger could not be bound by, or take advantage of, an estoppel.

It was formerly supposed in Maine that the mere *acceptance* of a deed of land by a grantee would estop him to deny the claim of the grantor's widow for dower.[2] But this doctrine has been overruled.[3] In Foster *v.* Dwinel, just cited, the prior cases are reviewed and shown to rest upon no good foundation.

In an able opinion, Mr. Justice Kent, speaking for the whole court, thus stated the ground of the decision: "If we depart from technical rules, and inquire what there is in the nature of an estate in dower that should give it this right of *creation* out of the mere fact that the tenant, or those under whom he holds, took a title from the husband, we may be at a loss to discover any substantial reason. We have seen that a widow cannot be defeated of her dower by any declarations or recitals of her husband. Why should she be allowed, as against the truth, to create this right when it never existed, by the mere fact that a title of some

[1] Kitzmiller *v.* Rensselaer, 10 Ohio St. 63 (1859).

[2] Kimball *v.* Kimball, 2 Greenl. 226; Nason *v.* Allen, 6 Greenl. 243; Hains *v.* Gardner, 10 Maine, 383. And so it is held in Massachusetts. Wedge *v.* Moore, 6 Cush. 8. And in South Carolina. Gayle *v.* Price, 5 Rich. 525. And in Kentucky. Dashiel *v.* Collier, 4 J. J. Marsh, 602. For the various doctrines of the different States, see 2 Scribner, Dower, pp. 217 *et seq.*

[3] Campbell *v.* Knights, 24 Maine, 332; Gammon *v.* Freeman, 31 Maine, 243; Foster *v.* Dwinel, 49 Maine, 44 (1861).

kind has been taken from the husband? If it were true that every seizin of the husband, which gave him a right to convey or interest in it, was necessarily a dowable seizin, there would be more force in the argument. But this is not true. A man may have only the estate and right of a mortgagee, which will not give dower, and yet he may properly give a deed of the premises.[1] . . . .

"It would seem to be a great stretch of the doctrine of estoppel to say, that by *accepting* a deed from the husband, which in no way alludes to the matter of dower, or to the existence of a wife of the grantor, the tenant is not only estopped from denying an actual seizin of the husband, sufficient to enable him to give the deed, but is also estopped from denying that the seizin was such as to give a third person an independent right in the estate, although in truth no such seizin ever existed, thus creating an estate by a rule of law where none ever before existed."

But the case of Campbell *v.* Knights[2] is still stronger. It appeared that the demandants were mortgagees, and the grantor owner only of an equity of redemption; and that the widow's dower in the premises had been set out. After the grantor's death, his equity was sold to the mortgagees, who took a deed containing these words: "Reserving from the conveyance the widow's dower, which has been assigned and set out heretofore." It was contended on behalf of the widow, that the demandants, by accepting a deed with this reservation, were estopped to deny that the dower had been properly assigned, and that the widow was entitled to dower. But the court ruled otherwise.

"The admission," said Shepley, J., "cannot be extended beyond its terms. Estoppels are mutual, and the demandants cannot be permitted to deny the facts stated in that clause of the deed. They are that the widow's dower had been assigned and set out to her in the premises, and that it was reserved by the administrator, and not conveyed to them. They have not admitted, as it respects themselves as mortgagees, that her husband died seized, or that she was entitled to dower in the premises. They cannot be precluded from establishing a title which may be good, and not inconsistent with their admissions."[3]

The same doctrine also prevailed in New York, at one time,

[1] Hutchins *v.* Carlton, 19 N. H. 487.
[2] 24 Maine, 332.
[3] Right *v.* Bucknell, 2 Barn. & Ad. 278.

which the early cases in Maine had declared.[1] But the cases to this effect have been overruled in this State also;[2] and the doctrine has been properly carried still further, as we shall presently see.

In the case just cited, the widow claimed dower in land conveyed by deed of quitclaim, in which she had not united.

After stating that a quitclaim deed only purports to pass whatever interest the grantor at the time possessed, Mr. Justice Wright said that, if the grantor had nothing, nothing passed; and not having covenanted to be answerable for the soundness of the title conveyed, he could not be held chargeable with bad faith in attempting to enforce any after-acquired title. And if the grantor might thus show that no title passed, the mutuality, which is an element of an estoppel, would allow the grantee to prove the same thing against the grantor. Much less could the grantee be estopped in a suit by the widow, who was not in any way a party to the conveyance.

In a subsequent trial of this case, it appeared that the grantee entered, in the first instance, under a mortgage, and that the quitclaim was intended to release the equity of redemption; but the Supreme Court held that the same principles must be applied, and that no estoppel had been created.[3] And this is now the more general and better doctrine.[4]

But a party is not estopped by a deed to him under which he does not claim.[5] In the case cited, the plaintiff brought an action for dower, claiming under a mortgage deed by her late husband to one Ware, which, by assignment to Isaac Kidder and sundry mesne conveyances, was traced to the defendant. Counsel on her behalf contended that the defendant was estopped by this mortgage to deny the plaintiff's right to dower in the land.

But the court said: "Such cannot be its legal effect. There is no evidence in the case that Isaac Kidder ever claimed title under this mortgage, or in fact that he had any knowledge that it had ever been assigned to him. It was not recorded until March 10, 1858.[6] From whence the demandant obtained this instrument does

[1] Sherwood *v.* Vandenburgh, 2 Hill, 303; Bowne *v.* Potter, 17 Wend. 164.

[2] Sparrow *v.* Kingman, 1 Comst. 242.

[3] 12 Barb. 201.

[4] Edmondson *v.* Montague, 14 Ala. 371; Crittenden *v.* Woodruff, 6 Eng. 82; Gardner *v.* Greene, 5 R. I. 104; Averill *v.* Wilson, 4 Barb. 180; Strawn *v.* Strawn, 50 Ill. 33; Gaunt *v.* Wainman, 3 Bing. N. C. 69. But see 2 Scribner, Dower, 237.

[5] Kidder *v.* Blaisdell, 45 Maine, 461.

[6] Though dated in 1819.

not appear, nor does it appear that the tenant had any knowledge of its existence before it was produced on trial. Under this state of facts he is not affected thereby."

A deed, further, only estops the parties in the character in which they execute it.[1] In the case cited, the plaintiff, as administratrix of the estate of her husband, executed a deed of real estate containing a covenant of warranty against the demands of all persons claiming under herself. She now brought an action for dower in the land, and the court held that she was entitled to recover.

Mr. Justice Cooley, who delivered the judgment, said that there was no ground for putting a construction upon the deed that would estop the plaintiff from claiming dower. The deed had been given by her in her representative character, as administratrix, and signed by her as such. The covenant against her own acts referred to such representative character, and it was not to be presumed that she had precluded herself from asserting her individual rights. Though it was true the covenant was not essential to the validity of the deed, still it was not meaningless, and might, under some circumstances, if the sale had proved defective, have given the grantee a right of action.

The same principle appears in the case of Metters *v.* Brown.[2] It was an ejectment to recover possession of a piece of land, in which the plaintiff sued as administrator of his mother. He sought to recover the premises by reason of a term of which it was said his mother died possessed, and which devolved upon him as administrator. The defence was that the defendant had been in possession under a mortgage by the plaintiff in his mother's lifetime. The defendant contended that the plaintiff was estopped from claiming the term by reason of his mortgage. But the court held that there was no estoppel.

"In our opinion," said Channel, B., speaking for the court, "the plaintiff, who sues as administrator of his mother, must be considered in the position of a stranger; and therefore the rule as to estoppel does not apply. For whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger."[3]

[1] Wright *v.* DeGroff, 14 Mich. 164.

[2] 1 Hurl. & C. 686.

[3] But it is held that a lease executed by one as agent of the lessor estops him from setting up any claim to the land inconsistent with the lease. Blanchard *v.* Tyler, 12 Mich. 339.

But if a guardian sell land of the ward, with a covenant that he was duly authorized to sell the premises, he cannot afterwards set up a claim to the land in his own right.[1] The court observed, in the case cited, that it was well established that a party was not allowed to plead or prove any matter inconsistent with the terms of his deed.

"On this principle," said Mr. Justice Wilde, "the case of Poor *v.* Robinson[2] was decided, — a case in most respects precisely similar to the present. In that case, the demandants claimed as children and heirs of Thomas Poor, their father; and the tenant produced a deed of release from two of the demandants, by which they released and quitclaimed unto him all the right of which the testator, their father, died seized in and to sundry lots of land, including the demanded premises. It appeared that the testator was disseized at the time of death, and so the deed was inoperative to pass the right of the testator; but it was held to be good by way of estoppel, to extinguish the right descending from the testator to his two children, the executors, and thus far the title to the tenant was confirmed, the court holding that they were not entitled to recover against their own bargain and contract with the tenant. That case and this, excepting in two particulars, are similar, and depend on the same principle. In Poor *v.* Robinson, the executors sold in their capacity as executors; in this case, the petitioner sold in his capacity as guardian. . . . .

"But in two particulars the cases differ. In Poor *v.* Robinson, the executors' deed purports to convey the right only of which the testator died seized. But in the present case, the petitioner's deed purports to be an unqualified grant of the land to the grantee in fee simple. It purports to pass the whole estate, and it is utterly inconsistent with the plainer import of the grant to allow the petitioner now to show that only a part of the estate passed by that conveyance. The other particular in which the cases differ is of more importance. In Poor *v.* Robinson, there do not appear to have been any express covenants. But in this case the petitioner expressly covenants that he is lawfully authorized and empowered to make sale of the granted premises, that is, of the whole estate. Most certainly he was not so authorized; and this covenant operates to avoid circuity of action, by way of rebutter, and estops the petitioner from setting up his title from Pitts Hall."

[1] Heard *v.* Hall, 16 Pick. 457. [2] 10 Mass. 131.

But in order to work an estoppel upon the parties to a deed, they must be *sui juris*, competent to make it effectual as a contract. Hence a married woman is not estopped by her covenants of warranty.[1] The case first cited was an ejectment; the plaintiff giving in evidence a deed from the defendant and her husband, by which they conveyed the premises in fee to the plaintiff, with warranty. The defendant offered to prove an outstanding title, but it was objected that she was estopped by the covenants in her deed. The objection was overruled.

Spencer, C. J., said that it was a settled principle of the common law that coverture disqualified a woman from entering into a contract or covenant personally binding upon her. She might at common law pass her real property by fine; and under the New York statute she might, in conjunction with her husband, on due examination, do the same. But the deed could not operate as an estoppel to her subsequently acquired interest.

An infant, also, not being *sui juris*, will not be estopped by his deed during his infancy, nor afterwards, unless he has ratified it.[2] Therefore an apprentice, bound to service until twenty-one years of age, will not be estopped by a recital of his age in the indenture.[3]

The question whether an estoppel is available against the State arose in Commonwealth *v.* Andrè.[4] It appeared that a committee of the legislature, duly authorized, granted by deed to Pierre Mathieu Andrè, his heirs and assigns, with warranty, a certain tract of land. Andrè at the time was an alien subject of France. The purchase was made for the benefit of one Billon, also a subject of France. Upon the death of these persons, intestate, the attorney-general, pursuant to an act of the legislature, filed an information to recover the land, alleging that it ought to escheat to the commonwealth for defect of title in any person who could by law hold it. But the court held the commonwealth estopped by

[1] Jackson *v.* Vanderheyden, 17 Johns. 167; Sparrow *v.* Kingman, 1 Comst. 242; Wallace *v.* Miner, 6 Ohio, 367; Wight *v.* Shaw, 5 Cush. 56; Lowell *v.* Daniels, 2 Gray, 161, overruling Fowler *v.* Shearer, 7 Mass. 21; Strawn *v.* Strawn, 50 Ill. 33. The last-named case holds that though the wife release dower and join in the warranty, she will not be estopped to claim an interest distinct from that of dower; and not being an estoppel upon the wife, it is not an estoppel upon the husband's heirs against the widow.

But in a few cases a different and untenable doctrine has been declared. Hill *v.* West, 8 Ohio, 222; Massie *v.* Sabastian, 4 Bibb, 433.

[2] Cook *v.* Toumbs, 36 Miss. 685.

[3] Houston *v.* Turk, 7 Yerg. 13.

[4] 3 Pick. 224.

its deed. "The deed of the commonwealth," said Parker, C. J., "to the very persons now defending as heirs to Andrè, to whom and to whose heirs the grant was made, is, we think, an estoppel against setting up the alienage of those persons as the ground of recovery." And this is certainly the better opinion.[1]

But in North Carolina a different doctrine prevails; and it is there held that an estoppel does not operate against the State, or its assignee.[2]

2. *Privity.*

The doctrine of privity is illustrated in the leading case of Taylor *v.* Needham.[3] The question raised on demurrer was whether the plea of *non demisit* was good when pleaded by an assignee who has had the estate of the lessee conveyed to him, which estate had been created by indenture.

Mansfield, C. J., delivered the judgment of the court. "There is nothing more clear," he said, "than that where a lessee takes an estate by indenture, he is not at liberty to plead *nil habuit in tenementis*, nor in any way to dispute the title of his lessor. Now this plea puts in issue, amongst other matters, the title of the lessor. It is truly stated for the defendant, that in cases of a grant or feoffment a stranger may plead 'did not grant, or did not enfeoff,' and that plea denies not only the existence, but the efficacy, of the supposed grant or feoffment. It brings in issue, therefore, the title of the grantor, as well as the operation of the deed, and that plea would be a proper plea to bring in issue the execution, construction, and efficacy of any deed of demise." Then the question comes, whether the assignee of the lease may be allowed to controvert the title of the lessor, when the lessee, under whom he derives, could not controvert the title of the lessor; so that the assignee should have a better right than he from whom he derives it. Exclusive of all the *dicta*, it would be a very odd thing, in the law of any country, if A could take, by any form of conveyance, a greater or better right than he had who conveys it to him; it would be contrary to all principle. But it does not rest merely on the general principle; for if you look into all the books upon estoppel, you find it laid down that parties and privies

[1] Carver *v.* Astor, 4 Peters, 1, 87; Penrose *v.* Griffith, 4 Binn. 231; Nieto *v.* Carpenter, 7 Cal. 527; Magee *v.* Hallett, 22 Ala. 699.

[2] Den d. Candler *v.* Lunsford, 4 Dev. & B. 407; Wallace *v.* Maxwell, 10 Ired. 110; Doe d. Taylor *v.* Shufford, 4 Hawks, 116.

[3] 2 Taunt. 279.

are estopped, and he who takes an estate under a deed is privy in estate, and therefore never can be in a better situation than he from whom he takes it. I cannot distinguish Parker *v.* Manning[1] from this case, though it is the converse. In a late case in this court, Williams, Sergeant, by an able argument from a devisee, endeavored to convince us that a recovery was void because there was no tenant to the *præcipe;* but it was answered for the heir, that the devisor was tenant on the record, and therefore estopped from disputing the recovery, and the devisee consequently was estopped. In the case of Trevivan *v.* Lawrence,[2] . . . . a judgment in *scire facias* against terre-tenants, which recited the original judgment as of the wrong term, was held to be an estoppel. For these reasons the defendant is as much estopped from pleading this plea as if he had been the original lessee."

The subject is illustrated again in Den d. Gardner *v.* Sharp.[3] In this case one Isaac Kyd, tenant in tail of the land in controversy, conveyed the same in fee, with general warranty, to the defendant, who had a title to the land by a warrant and survey under the proprietaries. The issue in tail of Isaac now brought the present action of ejectment against the defendant; contending that he was estopped to question the validity of the plaintiff's title, or to set up his paramount title from the proprietaries, by the deed from Isaac. But the court decided otherwise.

"The answer given to this argument by the defendant's counsel," the court observed, "is conclusive. If he is estopped to deny the title of the lessor to this land, because her ancestor, the tenant in tail, granted to Joseph Sharp [the defendant] a fee-simple interest in it, she must be estopped to deny the title so conveyed by that deed, since estoppels operate equally and reciprocally. But the fact is that the doctrine of estoppels has no application to this case. The deed from Isaac Kyd passed a bare fee to Sharp, and both of those parties were estopped to deny that title. But the lessor is neither party nor privy to that deed, but a mere stranger, claiming, not under Isaac Kyd, the tenant in tail, but under John Kyd, the donor, *per formam doni.*"

The case of Doe d. Marchant *v.* Errington[4] was ejectment to recover possession of a set of chambers in Lincoln's Inn. The facts in substance were, that one Boileau being possessed of the cham-

[1] 7 T. R. 537.
[2] 1 Salk. 276.
[3] 4 Wash. C. C. 609.
[4] 6 Bing. N. C. 79.

bers in controversy, to which he had been admitted by the owners of the fee simple, conveyed them to the plaintiff by deed, to hold during the grantor's life; the deed reciting that he was seized of the premises for life. Boileau continued in possession, and afterwards surrendered the chambers to the defendant, who was admitted by the owners. It was contended that the defendant, having received possession from Boileau, claimed under him, and in respect of title was in the same situation as Boileau; and he having conveyed the premises by deed reciting that he was seized for life, was estopped to deny that he had a life estate. But the court held that there was no estoppel.

Tindal, C. J., said that the case had been properly argued on the ground of an estoppel; for if it were a question of title, the plaintiff had no claim. "The plaintiff, therefore," he proceeded to say, "can only claim under the estoppel created by the deed of July, 1833; . . . . and the defendant neither claims through, nor after, nor from Boileau. An act indeed was to be done by Boileau, but the defendant's estate does not come from him, but from the trustees of Lincoln's Inn. The case comes nearer to that put by Sir W. Jones, in Edwards *v.* Rogers,[1] where he says, 'If a father disseize his son, and levy a fine, this fine will not bind the son as heir and privy, for he does not claim from his father; or if a father be tenant for life, remainder to his son in fee, and levy a fine, this will not bind the son as privy, for his reversion; or if the father levy a fine of the lands of the mother, the son is not bound.'"

An illustration of the doctrine of privity is also found in the case of Bates *v.* Norcross,[2] which was a writ of entry. The defendant relied upon a deed from one Packard to whom the premises had been conveyed by Ebenezer Davison, with general covenants of seizin and warranty. He then proved that after Davison died, the plaintiff married his only daughter and heir at law, and that she received assets by descent from her father of a greater value than the land in controversy. The plaintiff relied upon a title paramount to that of Davison. The defendant now contended that the plaintiff was rebutted by the covenants in the deed of Davison; and of this opinion were the court.

"We do not consider the doctrine of collateral warranty," said Mr. Justice Putnam, in delivering judgment, "as applicable to the case. If Davison were living and demanding the land, he would be

[1] Sir W. Jones, 460. [2] 17 Pick. 14.

estopped by his deed. So if his sole heir were suing for it, she would be estopped, being privy both in blood and estate. The warranty of her ancestor has descended upon her, and, as the case finds, with assets of greater value than the land. This is a case of lineal warranty with assets, so far as the daughter, sole heir and wife of the demandant, is concerned. She, at the time of her marriage, was undoubtedly liable, and her liability devolved upon the husband and wife. If he were to be considered a purchaser, for the valuable consideration of marriage, of all that came to the wife, it was *cum onere*. He and his wife became and were seized of the real estate in her right; and he took the personal estate absolutely, but subject to all the liability to respond to the warranty of her ancestor. If the demandant were to recover, the tenant would have an action against the demandant and his wife to recover back the value; and the judgment and execution would be against the husband and wife, and might be levied upon the body or estate of the husband."

No privity exists between a judgment creditor and his debtor.[1] In the case cited, Waters conveyed to Spencer all his right, title, and interest in certain land, with a general warranty, acknowledging receipt of payment, and took judgment for a portion of the purchase-money, which became a lien on the land. Subsequently other creditors obtained judgments against Spencer, which were levied on this land, and the proceeds of sale paid into court. These creditors now sought to take advantage of Waters's deed to Spencer, and to exclude the former from any participation in the distribution. But the court held that there was no estoppel by the deed.

Woodward, J., said: "Estoppels may be by deed, but estoppels by deed avail only in favor of parties and privies. Now the judgment creditors who seek to postpone Waters are not privies of Spencer, either in blood, in law, or by estate. Not in blood, for no relationship is alleged; nor in law, for the legal relation between debtor and creditor is one of antagonism, rather than of confidence or of mutual dependence; nor by estate, for they have none in the debtor's land. What proves that they have no interest in the land is, that a judgment against one of these judgment creditors would not be even a lien on this land. The truth is, the relation of judgment creditors to their debtor's real

[1] Waters's Appeal, 35 Penn. St. 523.

estate is anomalous. They have a lien upon it by virtue of statute law, but they have no interest in it such as makes them privies in estate with the debtor. The covenants, then, express or implied, of Waters's deed cannot operate in favor of Spencer's creditors as an estoppel by deed; and we do not understand any such effect to have been intended by what was said of the deed in Altman *v.* Klingensmith."[1]

In a case in the Supreme Court of the United States,[2] it had been contended on the argument that the recital of a certain lease, in a deed of marriage settlement, though conclusive of the existence of the lease in favor of the lessees, and those claiming under them by the same conveyance, was not conclusive for or against any other persons claiming under them by distinct conveyances. But the court thought otherwise.

Mr. Justice Story observed that if the recital were conclusive in favor of the lessees, it was equally conclusive in their favor as releasees, since the release worked upon the possession acquired under the lease. But in truth the recital as an estoppel bound all privies, whether claiming by the same or by a distinct instrument. It was the privity which constituted the bar, and not the fact of taking by the very deed which constitutes the recital.[3] It may be doubted, however, if this is not stating the doctrine of privity too broadly.

It is held, also, that a person becomes virtually a privy in estate, who defends his possession of the land on the ground solely that one of the grantors in a series of deeds had no title.[4] In the case cited, Lane, C. J., said that it was too limited a view of the effect of an estoppel to confine its operation to those only who claim an interest through the deed. "A person in possession," said he, "sustaining his possession by no other title than a denial that a former owner has parted with his right, is not a stranger; he becomes privy in estate to him whose title he maintains, and is concluded by what destroys it in his hands. For if title can be traced by B to A, and B can fasten upon A the incapacity of asserting his right, in consequence of his admission that he has conveyed to B, it is not just that a stranger, standing on A's claim only, and relying on no superior title, should be permitted to contest the existence of a fact which those interested have settled. The law, therefore, wisely attaches the disability of A to all who maintain his

[1] 6 Watts, 445.
[2] Crane *v.* Morris, 6 Peters, 598, 611.
[3] See Carver *v.* Jackson, 4 Peters, 1.
[4] Kinsman *v.* Loomis, 11 Ohio, 475.

title, and permits such estoppels to be used not merely defensively, but to sustain actions of ejectment. The present case affords a proper application of these rules. The sole defence consists in maintaining an outstanding title in Swift; but a fact is shown by Swift's admission which proves this title has no existence, and that the estate has passed to the plaintiff; an admission which binds not Swift only, and his heirs and assignees, but all who seek protection under the shelter of his name."

CHAPTER IX.

LIMITATIONS OF THE DOCTRINE.

HAVING now considered the first division of our subject, and determined the question to whom estoppels by deed apply, and the force of the rule upon the subject, we come upon the second and more extensive division, in which we propose to show to what the definition and rule given in the opening of the subject apply. And first of the limitations of the same.

1. *The Deed must be valid.*

It is an essential element to the estoppel by deed, that the deed itself should be a valid instrument;[1] a void instrument under seal does not work an estoppel.[2] The cases upon this subject will now be presented.

In the case of a public corporation, if its officers make a mortgage which they have no power to make, the rule of estoppel does not prevail; and they may deny their authority to execute the deed.[3] In the case cited, the trustees of a certain turnpike, having authority to erect toll-houses, and to mortgage the tolls, but having no power, as the court held, to mortgage the toll-houses or gates, in order to raise funds, executed to the lessors of the plaintiff mortgages of the tolls, and *also* of the toll-houses and toll-gates. The mortgagees now brought the present action of ejectment to recover possession of the toll-houses and gates. The trustees objected that the act did not warrant them in mortgaging this property, and judgment of nonsuit was given in the court below against the plaintiff. On a motion to set aside the nonsuit, it was contended that as some of the defendants had joined in executing the conveyance, they were estopped from taking that objection; but the court ruled otherwise.

[1] A sheriff's deed, if valid, is as efficacious to work an estoppel against the claim of execution debtor as one executed by him voluntarily. Gorham *v.* Brenon, 2 Dev. 174; Doe d. Logan *v.* Moore, 1 Dana, 57. But it has been held that one is not estopped by the recitals in his deed made by him *in invitum*, by order of court. McDougald *v.* Dougherty, 11 Ga. 570, 594.

[2] Unless an estoppel *in pais* should be subsequently produced; but this branch of estoppels we do not consider here.

[3] Fairtitle *v.* Gilbert, 2 T. R. 169.

Mr. Justice Ashhurst, in delivering judgment, said: "As then the trustees had no power to mortgage the toll-houses, the next question is, whether they are estopped to say so? In general, the party granting is estopped by his deed to say he had no interest; but that general principle does not apply to this case, where the trustees were not acting for their own benefit, but for the benefit of the public. And it would be hard that other creditors, who are not parties to the deed, should lose the benefit which the act has given them. Besides, there is a still further reason why the trustees should not be estopped; for this is a public act of Parliament, and the court are bound to take notice that the trustees under this act had no power to mortgage the toll-houses. This deed, therefore, cannot operate in direct opposition to an act of Parliament, which negatives the estoppel."[1]

But this last point stated by Ashhurst, J., has been qualified and explained in a more recent case.[2] The case cited was an ejectment by a mortgagee of tolls of a certain bridge. The plaintiff was not the first mortgagee, and was not empowered to recover as a trustee for all. But the ordinary principle was relied on, that a grantor cannot dispute with his grantee his own title to what he has assumed to convey. The application of the principle was, however, denied, on account of the public character of the defendant; counsel relying on the above *dictum* of Mr. Justice Ashhurst.

Lord Denman, after quoting the statement, said: "But that observation proceeded on the contents of the act, presumed to be known to both the contracting parties, and to qualify any contract into which they might enter in execution of its powers. No such presumption can be made as to any party's knowledge of the *fact* that a previous mortgage had been made; and there is no authority for holding that trustees for a public purpose are in any particular state of protection on such a point."[3]

But a deed made by a body before its incorporation, if it is within the powers afterwards granted, enures to the use of the grantee upon the incorporation of the grantors.[4]

[1] See Doe d. Baggaley *v.* Hares, 4 Barn. & Ad. 433.

[2] Doe d. Levy *v.* Horne, 3 Q. B. 757, 766.

[3] It would seem from the concluding remark of the Chief Justice, that he altogether doubted the soundness of the *dictum*. He said: "The *dictum* of Ashhurst, J., is not adopted by either of the two judges sitting with him, whose concurrence in the general result might be wholly independent of this doctrine." But the other judges did not express any dissent from the doctrine.

[4] Dyer *v.* Rich, 1 Met. 180, 190.

So, too, if a deed has been granted in contravention of the statute, the law of estoppel does not apply.[1] In the case first cited, an ejectment was brought for certain lands charged with an annuity, by the grantee against the grantor. No registration of the deed had been made, and the plaintiff contended that none was necessary, under the statute, by reason of the fact that the defendant had covenanted that the premises were of more than sufficient value to pay the annuity. The defendant offered to prove the contrary, and thus to show that the deed should have been registered. The plaintiff contended that he was estopped by the deed; but the court ruled otherwise.

Mr. Justice Patteson said: "I do not say whether, in a different case, this covenant would have been an estoppel or not. But the question here arises on a statute which says that an annuity deed, if no memorial is enrolled, shall be void, unless it falls under certain provisions contained in the tenth section. To enforce the deed, where there is no memorial, the parties must show that it comes within one of these provisions; in the present case, that the lands are of equal annual value with the annuity, or greater. To establish that here, the defendant refers to a covenant by which, as he says, it is stated that the lands are of such value. But that is not sufficient for the purpose. If it were held so, an instrument which the parties might choose to prepare would defeat the statute from beginning to end. They insert a covenant that the land is of the requisite value; they might equally well put in a statement that the annuity was given by marriage settlement, or without regard to pecuniary consideration, and then contend that the grantor was estopped."[2]

It is in accordance with the principle in these cases that a deed procured by fraud works no estoppel.[3]

But if the deed is void only against one of two grantors, but not as to the other, — as in the case of a deed of the wife's land by husband and wife, with defective privy examination, — the deed

[1] Doe d. Chandler *v.* Ford, 3 Ad. & E. 649; Doe d. Preece *v.* Howells, 2 Barn. & Ad. 744.

[2] See also to the proposition that there is no estoppel if the deed be void, Doe d. Stevens *v.* Hays, 1 Ind. 247; Housatonic Bank *v.* Martin, 1 Met. 294, 307; Germond *v.* People, 1 Hill, 343; Jackson *v.* Brinckerhoff, 3 Johns. Cas. 101 (conveyance of land in adverse possession. But on this point see Stockton *v.* Williams, 1 Doug. (Mich.) 546, holding that such deed works an estoppel).

[3] Hazard *v.* Irwin, 18 Pick. 95; Partridge *v.* Messer, 14 Gray, 180.

will be effectual as an estoppel on the grantor as to whom it was valid, though not as to the other.[1]

The effect of the estoppel, further, is

2. *Limited to Questions concerning the Deed.*

That this limitation prevails, preventing the estoppel from having a collateral effect, appears from many cases.[2] In Carpenter *v.* Buller,[3] the plaintiff sued for a trespass alleged to have been committed on his close. The defendant pleaded title in himself, and introduced in evidence a deed made between the parties, in which it was recited that the title to the property was in himself. Counsel for the plaintiff contended that the recital, though admissible in evidence, was not conclusive; and he proposed to show that the admission was made under a misapprehension. On the other hand, it was contended that the plaintiff was estopped by his admission in the recital, and that the evidence was therefore inadmissible. But the court ruled otherwise.

In delivering judgment, Parke, B., said: "All the instances given in Comyn's Digest,[4] under the head of 'Estoppel by Matter of Writing,' except one which relates to a release, are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence."

This subject is illustrated by Wiles *v.* Woodward.[5] The case was trover for a quantity of paper, to which the defendant pleaded not guilty and not possessed. It appeared that the plaintiff and the defendant had been in partnership together as paper-makers and iron-merchants, and that the partnership had been dissolved by deed, in which it was recited that an agreement had been made that the defendant should have all the stock in trade of the business in paper, but that the plaintiff should receive paper of a

[1] Wellboon *v.* Finley, 7 Jones, 228.

[2] Note the contrast between the estoppel by verdict and that by deed in this particular. See *ante*, pp. 35 *et seq.*

[3] Carpenter *v.* Buller, 8 Mees. & W. 209; Fraser *v.* Pendlebury, 31 L. J. C. P. 1; S. C. 10 Weekly R. 104; Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520; Carter *v.* Carter, 3 Kay & J. 617, 645.

[4] Estoppel (A. 2).

[5] 5 Ex. 557.

certain value out of the stock, to remain in the paper-mill for a year. On the other hand, the plaintiff was to have all the stock in trade in the iron branch of business. The deed then recited that in pursuance of that arrangement, paper of that value had been actually delivered to the plaintiff, and that it was then in the paper-mill. An assignment followed in the deed by the defendant to the plaintiff of all the stock in trade in the iron branch of business, and by the plaintiff to the defendant of all the stock in the paper branch, except that delivered to the plaintiff; and the partnership was dissolved. It appeared in fact that no paper had been delivered to the plaintiff; and it was contended that the plaintiff could not maintain an action of trover, as no certain, definite quantity of paper belonged to him; that as all the paper was assigned to the defendant, except that delivered to the plaintiff, the whole was the defendant's; and if not, that it was still the joint property of both, and therefore no action of trover could be maintained by the plaintiff, being one joint tenant, against the defendant, who was another. The reply was that both parties were estopped by the deed to say that no such delivery had taken place; and this too, not merely in an action on the deed, but in the present proceeding, to enforce the rights arising out of it, and which was not collateral to the deed. And of this opinion were the court.

Mr. Baron Parke, in delivering the judgment, said: "A recital, when it is of a fact agreed upon by both, binds both, as was held in Carpenter *v.* Buller,[1] and in Young *v.* Raincock,[2] and in Stroughill *v.* Buck;[3] and the present claim is not collateral to the deed, as was the case in Carpenter *v.* Buller. It is therefore an estoppel on both."

The same principle prevailed in the case of Norris *v.* Norton.[4] This was an action of trespass *de bonis asportatis*, in which it appeared that, under an execution against a third person, the plaintiff's property was levied on. The plaintiff claimed it, and proposed to try the right of property, but subsequently executed to the sheriff a delivery bond, with the understanding that he should not be thereby precluded from asserting his title. The property was delivered, and sold under protest, by virtue of the execution, whereupon the plaintiff brought this action against the purchasers.

[1] 8 Mees. & W. 209.
[2] 7 Com. B. 310.
[3] 14 Q. B. 781.
[4] 19 Ark. 319.

The defendants now contended that the plaintiff was estopped by the recitals in the bond from maintaining the action. But the court ruled otherwise.

"No plausible reason has been offered," said Mr. Justice Scott, in delivering judgment, "to sustain the idea that the appellee ought to be estopped by the recitals in the delivery-bond, under the circumstances of this case, and we can conceive of none; and certainly none of the authorities cited to the point come up to the facts of this case. If this proceeding was upon the delivery-bond, or was to vindicate or defend some right predicated upon or growing out of it, then most of them would be in support of the objection urged. But this is not the case here. The condition of the defendants has been in no way superinduced, or in any way affected, by the matter that they seek to set up as an estoppel against the appellee. The very instrument itself, in which the matter was contained, has performed its office, and in legal contemplation does not exist at all, unless as the root of something that has grown up from it."[1]

But it is held that a party to a joint deed cannot limit the effect of his deed by alleging that it only covered land held jointly by the grantors, and did not embrace land owned in severalty within the general limits mentioned in the deed.[2] The precise question in the case cited was whether, under a joint license by deed to make a canal through the land of the licensors, the licensees could be restricted to land held jointly by the parties, and whether one of the parties was barred from maintaining an action in respect of an injury to land owned in severalty. The license was in these words: "We, the said Israel, Ebenezer, and David, do hereby give to said corporation full and entire permission, authority, and power to make, finish, and complete said cross-dam, road, dike, and canals, and to keep up and maintain said dam, road, and dike, and to keep open and maintain said canals forever." The court held that the action could not be maintained.

The deed, they said, did not describe the grantors as tenants in common. The license made no reference to any particular land, but authorized the works generally. This necessarily precluded each party to the deed from claiming any damages consequent upon the act which they had authorized; and it was to be taken

[1] See Syme *v.* Montague, 4 Hen. & M. 180; Jemison *v.* Cozens, 3 Ala. 636.

[2] Francis *v.* Boston & R. Mill Corp., 4 Pick. 365.

to be their several as well as joint license. It would be absurd that a man who had joined with others in allowing an act to be done, which might injure his own land as well as that which he owned in common, should be allowed to say, "It is true I permitted you to do the act, but I did not intend you should do injury by the act to my land, but only to that which I owned with others." "Suppose the case," the court observed, "of three men owning a mill privilege in common, and one of them owning another privilege below on the same stream, and the three joined in a license or grant to stop the water above the first privilege, or to divert it so as to destroy both the privileges; can the one of the three who had joined in the deed complain because the privilege which he held in severalty is destroyed? Certainly not. The grant in such cases must be taken distributively, so that each grantor should be estopped from claiming any damages occasioned by the act which he had permitted."

3. *Grantee in Deed-Poll. — In Indenture. — Mutuality.*

In case the instrument be a deed-poll, — that is, the deed of the grantor only, — the doctrine is subject to the further and important qualification that the estoppel applies only to the grantor, and does not reach the grantee.[1] This qualification, it will be seen at once, strikes a decisive blow at the notion of mutuality, which is frequently said to be an essential element of an estoppel.

In Winlock *v.* Hardy, just cited, Boyle, C. J., speaking for the court in regard to a deed of this kind, said: "It is not the deed of the defendant, but of Isham only, by whom alone it is executed; and not being the deed of the defendant, it cannot, as a deed, operate to estop him from denying that the grantor had title. Nor can the deed create any relation between the parties to it, whereby the defendant would be estopped. We know that a tenant cannot deny the title of his landlord; nor can a person who enters upon land in virtue of an executory contract of purchase deny the right of him under whom he enters, for he is *quasi* a tenant, holding in virtue of his vendor's title, and by his permission. But the deed in question is an executed grant to the defendant in fee simple, and he holds, not as tenant of the grantor, but in his own right and for his own benefit, and his possession is

[1] Gardner *v.* Greene, 5 R. I. 104; Sparrow *v.* Kingman, 1 Com. 242; Great Falls Co. *v.* Worster, 15 N. H. 414, 450; Winlock *v.* Hardy, 4 Litt. 272.

adverse to his grantor, as well as to the rest of the world. He cannot, therefore, be under any greater obligation not to dispute his grantor's title than he is to dispute the title of any other person."

This qualification, however, does not extend, at the present day, to leases by deed-poll, as we shall see in Part III. And a tenant is now estopped to deny his landlord's title in such cases as perfectly as in leases by indenture; though it was otherwise in the time of Coke.[1]

A more important limitation of the rule concerning estoppels by deed is now to be presented and illustrated. No statement in the books is more common than that one who accepts a deed from another is estopped to deny the latter's title; and the contrary statement occurs almost as frequently. Leaving out of the question the relation of landlord and tenant, and all similar fiduciary relations (which will be treated in Part III.), we proceed to inquire of the true doctrine respecting the power of a grantee, holding free from all claims of, and therefore adversely to, the grantor, to deny the title of the latter.

The question was considered by the Supreme Court of New York in Averill *v.* Wilson.[2] "It is very evident," said Mr. Justice Paige for the court, "that no relation of landlord and tenant, not even in a qualified form, exists between a grantor and grantee. If the vendor has actually executed a conveyance, his title is extinguished in law as well as in equity. The vendee acquires the property for himself; and he is under no obligation to maintain the title of the vendor. He holds adversely to his grantor, and may treat him as a stranger to the title. The property having become the property of the vendee by the sale, he has a right to fortify his title by the purchase of any outstanding title which may protect him in the quiet enjoyment of the premises.[3] Chief Justice Marshall, in Blight's Lessee *v.* Rochester,[4] says that 'no principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it.' In Osterhout *v.* Shoemaker, Bronson,[5] J., says: 'Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor; and there can be no good reason why he should not

[1] Coke Litt. 47 b. See Part III.
[2] 4 Barb. 180.
[3] This had been done in the present case.
[4] 7 Wheat. 535.
[5] 3 Hill, 513.

be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time, or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.'[1] . . . .

"When a grantor who has no title conveys with warranty, any estate subsequently acquired by him will enure to the benefit of the grantee, upon the principle of avoiding circuity of action. The grantor cannot be said technically to be estopped by his deed from averring he had no title when he conveyed; but the warranty interposes and rebuts and bars him and his heirs of a future right which was not in him at the time of the conveyance. . . . . The grantor with warranty is not estopped by any recitals or allegations in his deeds, upon the strict principles of a technical estoppel, from asserting his title subsequently acquired. But it is his warranty which rebuts and bars him of this newly acquired title, and passes it to his grantee, or causes it to enure to his benefit. In fact, in the usual form of a covenant of warranty, there is no precise and direct assertion of a present title in the grantor, nor a representation that he is the owner, which could operate upon the grantee as an inducement to purchase and part with his money. But the grantee takes the warranty, and relies upon that as his indemnity against any defects in the title. . . . .

"In this view of the effect and operation of a deed with warranty, upon the rights of the grantor, there is nothing inconsistent in the principle that a grantee in a warranty deed is not estopped from controverting the title of his grantor. If, as is shown by the cases before cited, no relation of landlord and tenant exists between a vendor and a vendee after a conveyance from the former to the latter; if the title of the vendee, although derived from, is adverse to, the vendor; if the vendee owes no faith or allegiance to the vendor; if by the sale the title of the vendor is extinguished, and the property becomes the property of the vendee, and

[1] See also Watkins *v.* Holman, 16 Peters, 25, 54; Society for Propagation of Gospel *v.* Pawlet, 4 Peters, 480, 506; Voorheis *v.* White, 2 Marsh. 27; Winlock *v.* Hardy, 4 Litt. 272. *Ante*, p. 289.

he takes the land to hold for himself and to dispose of it at his pleasure; the vendee does the vendor no wrong by treating him as a stranger to the title, by either controverting his title, or by buying in an outstanding title, although the conveyance from the vendor to the vendee may have been with warranty."

So far as this doctrine is applicable to the facts in the case, — the acquisition by the grantee of an outstanding title, — it is no doubt correct; and it would seem on principle that the language which would give the doctrine a further operation, and allow the grantee to controvert the grantor's title at all events, may not be too strong. Still it is certainly said in many cases of accepted authority that a grantee cannot question his grantor's title so long as he claims under that title alone;[1] but this is the extent of the estoppel, and he may show a better outstanding title, which he has acquired.[2]

In Johnson *v.* Watts, just cited, — an action of ejectment, — Mr. Justice Battle, speaking for the court, said that M., under whom the defendant claimed, derived title from P., the first husband of the plaintiff, who was the heir at law of William Mackey. M. could not then deny the title of Mackey. When sued in ejectment, therefore, by the plaintiff, he could not deny her title. The defendant could only defend himself by showing that he had a better title in himself than that of the plaintiff, derived either from the person under whom they both claimed, or from some other person who had had a better title.[3]

So it is held that a recital of a prior conveyance in a deed under which a party holds, will not estop him from claiming under a paramount title;[4] and that one who accepts a conveyance reciting a prior lease or mortgage cannot impeach the title of the lessor or mortgagor on any ground that would have been open to his grantor, unless he can show that he has acquired a better title.[5]

[1] Ives *v.* Sawyer, 4 Dev. & B. 51; Den d. Love *v.* Gates, Ib. 363; Den d. Gilliam *v.* Bird, 8 Ired. 280; Den d. Johnson *v.* Watts, 1 Jones, 228; Doe d. Worsley *v.* Johnson, 5 Jones, 72; Rochell *v.* Benson, Meigs, 3; Wilkins *v.* May, 3 Head, 173; Carver *v.* Astor, 4 Peters, 1, 83; Woburn *v.* Henshaw, 101 Mass. 193.

[2] Johnson *v.* Watts, *supra;* Worsley *v.* Johnson, *supra;* Carver *v.* Astor, *supra;* Addison *v.* Crow, 5 Dana, 271; Torrey *v.* Bank of Orleans, 9 Paige, 649.

[3] Den d. Love *v.* Gates, 4 Dev. & B. 363; Copeland *v.* Sauls, 1 Jones, 70.

[4] Baldwin *v.* Thompson, 15 Iowa, 504; Jackson *v.* Carver, 4 Peters, 1, 83; Crane *v.* Morris, 6 Peters, 598, 611.

[5] Addison *v.* Crow, 5 Dana, 271; Coakley *v.* Perry, 3 Ohio St. 344; Ward *v* McIntosh, 12 Ohio St. 233.

But a person will not be permitted to accept a deed with covenants of seizin, and then turn round upon his grantor and allege that his covenants are broken by reason of the fact that he himself, at the time he accepted the deed, was seized of the premises.[1]

4. *Estoppel against Estoppel*

sets the matter at large; which is another limitation of the doctrine under consideration. And such a case occurs where the deed is encountered by another instrument of equally high rank, inconsistent with the deed, and made between the same parties.[2]

"In this case," said Shepley, J., in Brown *v.* Staples, "Winthrop Allen could maintain no action upon the covenants of the deed made to him by the demandant for a breach occasioned by his being deprived of the land by virtue of the mortgage made by Elliot Staples to John Welles, for he had by an obligation of as high a nature obliged himself to discharge that mortgage, and had thereby annulled the operation, for such purpose, of those covenants. It has been decided that a covenant of warranty would not include an incumbrance which the grantee had engaged to discharge."[3] The doctrine is closely allied to the following.

5. *No Estoppel if Truth appears.*

Another minor qualification is that, if the truth appears on the face of the deed, there is no estoppel.[4] And this simply means that all parts of the deed are to be construed together; and that if an allegation in the deed, which alone would work an estoppel

"And this would seem to be all that is meant by the broad declaration .... that a man who accepts or acts under a deed cannot dispute the facts which it recites." 2 Smith's L. C. 712, 6th Am. ed., citing Chautauque Co. Bank *v.* Risley, 4 Denio, 480; Denn *v.* Cornell, 3 Johns. Cas. 174; Springstein *v.* Schermerhorn, 12 Johns. 357; Funk *v.* Newcomer, 10 Md. 301, 316; Wood *v.* McIntosh, 12 Ohio St. 231.

See also, upon this subject, Chiles *v.* Boothe, 3 Dana, 567; Cutter *v.* Waddingham, 33 Mo. 269; Lorain *v.* Hall, 33 Penn. St. 270; Walthall *v.* Rives, 34 Ala. 91 (mortgagee not estopped to purchase paramount title); Woburn *v.* Henshaw, 101 Mass. 193, holding that one in possession of a mill, located on a canal, and claiming title by a deed made by order of court, binding him to keep the canal in repair, cannot escape from this liability on the ground that the order of court was defective, and that no title was passed by the deed.

[1] Fitch *v.* Baldwin, 17 Johns. 161, 166; Beebe *v.* Swartwout, 3 Gilm. 162, 179; Furness *v.* Williams, 11 Ill. 229.

[2] Brown *v.* Staples, 28 Maine, 497.

[3] Watts *v.* Welman, 2 N. H. 458.

[4] Coke Litt. 352 b; Pargeter *v.* Harris, 7 Q. B. 708; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; S. C. 6 Hurl. & N. 135; Wheelock *v.* Henshaw, 19 Pick. 341; Pelletreau *v.* Jackson, 11 Wend. 110, 118; Jackson *v.* Sinclair, 8 Cowen, 543, 586.

upon the parties, is explained in another part of the deed, or perhaps in another deed to which reference is made *for the purpose*,[1] there is no estoppel.

In Pargeter *v.* Harris, just cited, — an action for breach of covenant in a lease, — the strength of the defendant's case, as Lord Dunman said, lay in the argument that the declaration was inconsistent and repugnant, because it set out a part of the lease in which the plaintiffs were called "owners," and by which they demised to the defendant, and thus averred that they had no reversion. The former statement, it had been contended, estopped the plaintiff from making the latter. The declaration stated purposely "so much of the lease," said the Lord Chief Justice, "as shows that the plaintiffs had only the equity of redemption in the premises, and that the defendant knew that circumstance from the recitals in the lease. The recital is of itself sufficient to prevent either party being estopped from denying that the plaintiffs had a legal reversion; in truth, it estops them from asserting it."

So, too, it is held that if an ejectment be brought upon a lease which shows upon its face that the lessor has no legal reversion, there will be no estoppel on the tenant.[2] The ground of these cases is suggested to be, that the covenant must be enforceable as an obligation arising at law, and the ejectment requires a legal estate in the plaintiff.[3] In the case of an action to try the validity of a distress, where this technical ground does not exist, the estoppel upon the tenant is not obviated by the lease showing the want of a legal title in the lessor.[4] The distinction, if real, is a nice one; and the cases like Pargeter *v.* Harris and Saunders *v.* Merryweather now stand on narrow ground. The subject is considered in other parts of this work.[5]

It is proper to add that the recent cases referred to do not seem to affect the general doctrine that there is no estoppel where the truth appears, except in the peculiar relation of landlord and tenant.

[1] A mere inconsistency between the deed in litigation and the one to which it refers will not be sufficient to avoid the estoppel. Lainson *v.* Tremere, 1 Ad. & E. 792, presented at length on next page.

[2] Saunders *v.* Merryweather, 3 Hurl. & C. 902.

[3] Morton *v.* Woods, Law R., 4 Q. B. 293, 303.

[4] Morton *v.* Woods, *supra*; Jolly *v.* Arbuthnot, 4 De G. & J. 224.

[5] *Post*, pp. 329–331. Also in Part III.

CHAPTER X.

RECITALS.

A RECITAL in a sealed instrument is defined to be the preliminary statement of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the transaction is founded.[1] The recital is generally contained in the premises of the deed, and usually commences with the formal word "whereas," which, when there are several recitals in connection, is repeated accordingly, — "and whereas."[2] However, we shall see that recitals are also introduced in other ways, and that the term is extended to other parts of the deed than the preliminary statement of the inducement and purpose.

We propose now to consider the effect of recitals, so far as they relate to the general subject in hand; and first as to

1. *Particular and General Recitals.*

The case of a particular recital was before the Queen's Bench in Lainson *v.* Tremere.[3] The action was upon a bond, the condition of which declared, by way of recital, that, by indenture of lease between the plaintiff's testator and the defendant, the testator demised premises to the defendant at the yearly rent of £170. The defendant pleaded that the lease in the condition mentioned was a lease the *reddendum* of which was £140 only, and that that sum had always been paid. The whole lease was set out, by which it appeared that the rent was at £140 per year. But the court held the defendant to be estopped.

Lord Denman, who delivered the judgment, began by stating that the authorities were clear that if there was a condition to perform the covenants of an indenture, the obligor was estopped to deny the existence of the indenture; or, in general, when the condition of a bond has reference to any particular thing, the obligor is estopped to say that there is no such thing.[4]

[1] 2 Black. Com. 298.
[2] Burrill, Law Dict. "Recital."
[3] 1 Ad. & E. 792.
[4] 1 Rolle's Abridgment, 872 b.

He then proceeded thus: "The whole lease being set out, the defendant contends that the actual lease is to be taken as a further description of the lease recited in the condition of the bond, according to what is said by Holt, C. J., in Evans *v.* Powel;[1] and that the bond and lease are to be taken as together forming one instrument. And as it appears by the lease that the rent is £140 a year, the defendant says, as it is the lease which contains the real contract of the parties, and the rent being to be paid for the occupation of the land, that, if he has paid the rent stipulated, he has performed the contract specified in the lease, and it is therefore an answer to the action; that the bond does not show the contract as to the rent, but is merely given as a collateral security for the performance of the terms of the lease; and if he has performed the terms of the lease, the bond cannot be enforced against him.

"But notwithstanding the argument, we think, as far as the bond goes in a court of law, the obligor is estopped from saying that the rent was not £170 a year, because his showing the lease at a rent of £140 is, in effect, the same thing as saying that there is no such lease as is stated in the bond. In 1st Rolle's Abridgment,[2] there is a case of Fletcher *v.* Farrer, as follows: 'If the condition of an obligation be to do certain things, for which the obligor is bound in a certain recognizance, showing the certainty of it, then the obligor shall be estopped to plead that he was not bound in any recognizance, inasmuch as the condition has reference to a particular. So the obligor, in the case aforesaid, shall be estopped to plead a special plea by which he owns that he acknowledged a thing in the nature of a recognizance, but upon the special matter it appears to the court it was not any recognizance in law; for this amounts but to this, that he was not bound in any recognizance.'

"Upon what appears on the record, there is no doubt but, if an action of covenant had been brought on the lease, only £140 could be recovered; and there certainly is an apparent incongruity in saying that different sums are to be recovered according as the proceeding is on the bond or the lease. This, however, is occasioned by the defendant having executed two apparently inconsistent instruments."

In a subsequent case,[3] a declaration in covenant, which stated

[1] Comb. 377.

[2] 873 b; Estoppel, (P) pl. 10, 11.

[3] Bowman *v.* Taylor, 2 Ad. & E. 278.

that, by indenture, after reciting that the plaintiff had invented certain improvements in the construction of looms, and had obtained letters-patent for the sole use of the invention, and that he had agreed with the defendants to permit them to use the invention, stated that the plaintiff did covenant to permit the defendants to use it; in consideration of which, the defendants agreed to pay a certain sum. The declaration then alleged a breach of performance by the defendants. The latter pleaded that the invention was not a new one, and that the plaintiff was not the first or true inventor of the improvements. It was contended, on the part of the plaintiff, that the defendants were estopped from pleading the pleas mentioned; while counsel for the defendant contended that the pleas were consistent with the deed. The court decided that the pleas were bad, directly affirming the doctrine of Lainson *v.* Tremere, above presented.

Taunton, J., said: "The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed, under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant, under his hand and seal, that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital; but I do not see that a statement such as this is the less positive because it is introduced by a 'whereas.' Then the defendant has pleaded that the supposed invention in the declaration and letters-patent mentioned was not nor is a new invention. These words, 'was not nor is a new invention,' must be understood in the same sense as the words 'had invented,' in the recital of the deed set out in the declaration, and must refer to the time of granting the patent; and if the invention could not then be termed a new invention, it could not, I think, have been truly said in the deed that the plaintiff 'had invented' the improvements, in the sense in which the deed uses the words. Then the plea directly negatives the deed, and comes within the rule that a party shall not deny what he has asserted by his solemn instrument under hand and seal."

The same judge thus distinguised the case from Hayne *v.* Maltby:[1] "Here there is an express averment in the deed that the

[1] 3 T. R. 438.

plaintiff is the inventor of the improvements; there the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been though the assignor was not the original inventor."

Mr. Justice Patteson said: "The only authority cited for the proposition that no estoppel can be by recital is that from Co. Litt.[1] It is not denied, however, that there have been many cases in which matter of record has been held to estop; but then it is said that the recital in those cases has been inseparably mixed with the operative parts of the deed. But if that be a test, the case is so here. The deed recites that the plaintiff has invented improvements and obtained a patent for the invention; and then it proceeds to a demise of the very subject-matter for which the patent is granted. I cannot separate these things; and I therefore think the recital here comes within the description which Mr. Wightman has given of the law laid down by the old cases. The passage in Lord Coke must be taken with some little qualification; and Lainson *v.* Tremere[2] is a direct authority to show that there may be an estoppel by way of recital."

The doctrine of these cases has been held in several other English decisions.[3] In Horton *v.* Westminster Commissioners, Martin, B., said: "This is an action upon an instrument under seal, whereby the defendants have contracted to do certain acts; and in order to excuse themselves from performing them, they ought to make out a clear legal defence. Now the instrument itself states [by recital] that the defendants were authorized to borrow money for the purposes of the acts; and that, in pursuance of the acts, they had borrowed the money for which this bond was given. The first of these pleas in effect states that the money was not borrowed for the purposes of the acts; but I think that the defendants are estopped from setting up any such defence. It has been argued that the doctrine of estoppel does not apply here; but the case of Hill *v.* The Proprietors of the Manchester Water Works[4] satisfies me that it does. The meaning of estoppel is this, that the parties agree, for the purpose of a particular transaction, to

[1] 352 b.

[2] 1 Ad. & E. 792, *supra*.

[3] Horton *v.* Westminster Commissioners, 7 Ex. 780; Hill *v.* Manchester & S. W. W. Co., 2 Barn. & Ad. 544; Shelley *v.* Wright, Willes, 9.

[4] 2 Barn. & Ad. 544.

state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened when the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement. That is totally different from this case; for here the contract itself is perfectly legal, and though the plea is not the same, yet the case is substantially the same as that of Hill *v.* The Proprietors of the Manchester Water Works, which in my judgment is good sense and good law."

Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties; but it is a question of construction whether the recital is so intended. If a proper construction of the recital shows that but one of the parties agreed to admit the fact, the other party will not be estopped by it.[1] Stroughill *v.* Buck, just cited, was such a case. It was an action on a deed of indenture between the plaintiff and the defendant, which recited that the defendant had advanced money to one Ogle, on the security of certain deeds, and that the defendant was interested in those deeds to that extent; that it had been agreed that the plaintiff should make further advances to Ogle; and that the defendant should assign the deeds, and his interest therein, to the plaintiff as security. The defendant assigned them to the plaintiff, and covenanted that the money so advanced by him (the defendant) was due to him and unsatisfied. The action was for a breach of this covenant, the plaintiff alleging that the money was not due when the covenant was made. The question finally arose upon demurrer, whether the plaintiff were estopped by the recital to allege that the money was not due.

Mr. Justice Patteson, speaking for the court, said that when a recital was intended to be a statement which all the parties to the deed had mutually agreed to admit as true, it was an estoppel upon all; but when it was intended to be the statement of one party only, the estoppel was confined to that party, and the intention was to be gathered from construing the instrument. He referred to Young *v.* Raincock[2] as containing a review of the authorities.

Referring to the case before the court, he said that the plaintiff was not estopped to deny that the defendant had made advances; for as this fact was material for the validity to the plaintiff of the

[1] Stroughill *v.* Buck, 14 Q. B. 781. [2] 7 Com. B. 310.

securities on which he had advanced the money, and as he had taken the covenant to secure to him the truth of this fact, the true construction of the recital was, that it was intended to be the statement of the defendant only.

If the parties to a deed bound the land conveyed upon a street, they are estopped to deny the existence of the street.[1] In the case first cited the question arose upon the construction of a deed from R. to T., in which the former conveyed to the latter a piece of land in New Bedford, bounding it southwardly and westwardly on a way or street.

"By this description," said Parker, C. J., "the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets. It probably entered much into the consideration of the purchase that the lot fronted upon two ways, which would be always kept open, and indeed could never be shut without a right to damages in the grantee or his assigns."[2]

But a description of land bounded on a street named does not amount to a covenant of the existence of a street of the width of the one named, if it has since been closed, but only that there shall be a way of reasonable width.[3] In the case cited, the plaintiff claimed to be entitled by the terms of a deed to a street on his westerly boundary, sixty feet wide.

"The words of the deeds, 'westerly on Park Street,'" said the court, "would seem to imply that there was a street there of that name. . . . . If it had been once opened as a street by a former proprietor, but afterwards a large tract of land, including the street, had been sold as one parcel, and the street closed up, before any house-lots were sold (as on the evidence reported the jury must find), then the deed amounted to an implied covenant, and a grant, if the grantor owned it, that the grantee should have a right to a convenient street and passage-way. There would be nothing, in that case, to designate or limit the dimensions of the way thus granted by implication; but it must be presumed that some way was intended for the purposes of passing, indicated by the use of the word 'street.'"

[1] Parker *v.* Smith, 17 Mass. 413.

[2] See O'Linda *v.* Lothrop, 21 Pick. 292; Tufts *v.* Charlestown, 2 Gray, 271; Loring *v.* Otis, 7 Gray, 563.

[3] Walker *v.* Worcester, 6 Gray, 548.

The recent case of Freeman *v.* Auld[1] involved the same principle. Premises had been conveyed to the defendant, "subject to certain mortgages now a lien on said premises: one made to the Home Insurance Company, to secure the sum of $4,000, with interest; and the other made to Ira A. Allen, to secure the sum of $1,000."

The court said that the defendant, by receiving his conveyance on these terms, had conclusively admitted the lien of the mortgages. If the conveyance had contained the further words, "which the said grantee hereby assumes and promises to pay," this would have caused a personal liability on the part of the defendant to pay the mortgages;[2] but it would have had no greater effect of subjecting the premises than was imposed by the clause as it stood.[3]

The case of Cutler *v.* Bower[4] was an action upon a covenant to pay the sum of £2,200 by instalments, in an indenture. The deed recited the grant of letters-patent to the plaintiff in 1841, for a certain invention, and also recited a deed dated July 23, 1842, by which the plaintiff granted the defendant the sole use of the patent, subject to the payment of a certain royalty. The deed then recited that the defendant had agreed with the plaintiff for the absolute purchase of a half-interest in the patent, subject to the indenture last mentioned, but with the benefit of one half of the royalty thereby reserved. It was then recited that, in consideration of £2,200, for the purchase of half the patent and half the royalty, the plaintiff assigned and transferred the patent to a trustee for the defendant. The defence pleaded was, that the plaintiff was not the first inventor, and that the patent was void.

The court said that, as there had been no eviction, the consideration had not wholly failed. The defendant was at all events bound by the indenture of July 23d to the royalty therein named, whether the patent were valid or not, as he would be estopped from denying the validity of the patent in an action upon that deed; and by the deed upon which the action had been brought, he was entitled to half the royalty.

A similar question was raised in Hills *v.* Laming.[5] The action

[1] 44 N. Y. 50 (1870).

[2] Lawrence *v.* Fox, 20 N. Y. 268; Ricard *v.* Sanderson, 41 N. Y. 179.

[3] See also Green *v.* Kemp, 13 Mass. 515; Housatonic Bank *v.* Martin, 1 Met. 294, 307; Jackson *v.* Thompson, 6 Cow. 178; Lee *v.* Clark, 1 Hill, 56.

[4] 11 Q. B. 973.

[5] 9 Ex. 256.

was covenant to recover a certain sum stipulated to be paid as liquidated damages for the breach of a covenant concerning the use of certain patents. It appeared that there had been a dispute between the parties as to their rights under certain patents, which was finally adjusted by their entering into an agreement under seal, reciting that a certain patent had been granted to the defendant, and a certain other patent had been granted to the plaintiff, and that, to put an end to their differences respecting them, the parties covenanted that the defendant should have the exclusive use of the patent granted to the plaintiff, under certain limitations, and that the plaintiff should have the exclusive use of the patent granted to the defendant, under similar limitations. The defendant pleaded to the action that the plaintiff's patents were not valid, that the inventions were not new, and that the plaintiff was not the first inventor. On demurrer the court held the plea bad, distinguishing the case from Hayne *v.* Maltby.[1]

The sureties in an administration bond are estopped by its recitals to deny that their principal had been duly appointed to the office of administrator:[2] So in the case of the bond of deputies to the sheriff, if the bond recites that the parties signing were deputies, they will not be permitted to deny the allegation.[3]

And it has been held, in a suit upon a replevin bond, that the obligors will not be permitted to deny that the property was that of the defendant in the attachment, where the bond recited that the property had been "attached as" his;[4] but a contrary doctrine has also been held with much apparent soundness.[5] However, it is certain that if the recital is specific, — as when it alleges that a writ was issued against the goods, chattels, lands, and tenement of the defendant, and a certain piece of property was levied upon by virtue of the writ, — the obligor cannot deny that the property belonged to the defendant in attachment,[6] unless before

[1] 3 T. R. 438.

[2] Cutler *v.* Dickinson, 8 Pick. 386; Bruce *v.* United States, 17 How. 437; Shroyer *v.* Richmond, 16 Ohio St. 455; Norris *v.* State, 22 Ark. 524.

[3] Cox *v.* Thomas, 9 Gratt. 312; Cecil *v.* Early, 10 Gratt. 198. Nor will a surety be permitted to say that his principal was dead at the time the instrument was executed. Collins *v.* Mitchell, 5 Fla. 364. So, too, the execution of a mortgage to a corporation estops the mortgagor to dispute the existence of the corporation. Franklin *v.* Twogood, 18 Iowa, 515.

[4] Bursley *v.* Hamilton, 15 Pick. 40.

[5] Decherd *v.* Blanton, 3 Sneed, 373.

[6] Gray *v.* MacLean, 17 Ill. 404; Michell *v.* Ingram, 38 Ala. 395; Dezell *v.* Odell, 3 Hill, 215.

forfeiture he surrendered the property in accordance with the terms of the bond.[1]

So where a deed of land described it as the premises on which the grantor resided, the parties were held estopped to deny that the premises were the homestead of the grantor.[2] And a recital in a chattel mortgage that the property mortgaged is personal estops the mortgagor to say it is real property, whatever the fact may be.[3]

But a party is not estopped by a recital in his deed that the title was derived in a particular way, unless it appears that the title was acquired in that way, and that the party claims under that title.[4]

So, too, a widow, by executing a release, in which she styles herself widow and sole devisee, is estopped to deny that she has elected to take under her husband's will.[5] And a deed which recites that the defendant has bargained, sold, and *delivered* certain property, estops him to dispute the delivery.[6]

The above cases, it must be noticed, speak of the recitals of particular facts; and it is laid down in an early work,[7] that "if the condition contain a *generality* to be done, the party shall not be estopped to say there was not any such thing. But in all cases where the condition of a bond has reference to a *particular* thing, the obligor shall be estopped to say that there is no such thing." And this distinction is adopted by Lord Denman in a case already cited.[8]

The ground of this distinction is pointed out by the learned Mr. Smith, as being the same as that which prevails in the case of estoppels by matter of record, namely, that an estoppel must be certain.[9] And he supports the reason by the citation of several cases.[10] The case first referred to was an ejectment, in which it appeared that the plaintiff claimed under a release which recited

[1] Page *v.* Butler, 15 Mo. 73.

[2] Williams *v.* Swetland, 10 Iowa, 51.

[3] Ballou *v.* Jones, 37 Ill. 95.

[4] Hovey *v.* Woodward, 33 Maine, 470. See Great Falls Co. *v.* Worster, 15 N. H. 414, 450; Housatonic Bank *v.* Martin, 1 Met. 294, 307.

[5] Dundas *v.* Hitchcock, 12 How. 256.

[6] Nevett *v.* Berry, 5 Cranch, C. C. 291.

[7] Rolle's Abridgment, Estoppel, (P) pl. 1, 7.

[8] Lainson *v.* Tremere, 1 Ad. & E. 792. So in Strowd *v.* Willis, Cro. Eliz. 762; Shelley *v.* Wright, Willes, 9; Salter *v.* Kidley, 1 Show. 59.

[9] 2 Smith Lead. Cas. 752, 6th Eng. ed.

[10] Particularly Right *v.* Bucknell, 2 Barn. & Ad. 278; Salter *v.* Kidley, 1 Show. 59; Kepp *v.* Wiggett, 10 Com B. 35.

that the grantor was "legally or equitably" seized of the premises. The defendant having acquired the legal title, it was held that he was not estopped to rely upon it.

Lord Tenterden said that it was a rule that an estoppel should be certain to every intent; and therefore, if the thing could not be precisely and directly alleged, or if it were mere matter of supposal, it was not an estoppel. In the present case there was a want of that certainty of allegation in the recital which was necessary to make it an estoppel.

But the case of Kepp *v.* Wiggett, above cited, is still more in point. In that case the condition of a bond recited that a certain person "had been duly nominated and appointed collector." The court held that this recital did not estop the defendants from showing that there had been no complete appointment of the person as collector.

Maule, J., observed: "As to the question of estoppel, it appears to me that the matters that are stated in the case,— some of them by recital in the condition of the bond, — and which were in the knowledge of all parties, show that, in speaking of the appointment of Lee as collector, they did not mean that he was fully armed with authority to collect the sum assessed. He had been appointed to collect, and was the person who was intended to be armed with power to collect and enforce payment of the sums assessed. Still he was a collector within the sense and meaning of the expressions used in the bond. I therefore think that the doctrine of estoppel does not apply."

Mr. Justice Williams thus stated the position: "As to the remaining question, whether the defendants are estopped by the recitals in the bond from setting up this defence, it is to be observed that it is a rule that estoppels must be *certain* to every intent. And here it is at least doubtful whether the recital that Lee had been duly nominated and appointed a collector for the year ending the 5th of April, 1847, and that duplicates of the assessment had been delivered and given in charge to him, with a warrant or warrants for collecting the same, should be referred to the assessments under schedule (A) or schedule (D). I therefore think there is no estoppel."

The distinction between a conveyance by general and one by particular description is illustrated by Doe d. Butcher *v.* Musgrave.[1]

[1] 1 Man. & G. 625.

The action was ejectment to recover a certain canonry, under a mortgage by demise for ninety-nine years, of "all that the canonry of him, the said R. A. Musgrave, of the king's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments *belonging thereto*, and all and every the rights, rents, profits, emoluments, privileges, advantages, and appurtenances to the said canonry belonging."

As stated by the chief justice, the question was, whether the action could be maintained either for the canonry, or for the house in which the defendant resided as a canon of Windsor. It did not appear that any other property had been specifically appropriated to the canonry, and the argument had been confined to the house.

"A preliminary objection," said the chief justice, "has been taken on behalf of the lessor of the plaintiff, that as between her and the defendant, as mortgagee and mortgagor, the defendant is estopped by the mortgage deed from denying that he has the title he therein assumed to have, or from setting up title in any one else. I entirely concur in that as a general proposition; but the question here is, not whether the defendant may set up a title in some third party, but whether he may not say that the house is not comprised in the description contained in the mortgage deed. If the house had been included in the mortgage by a particular description, the defendant could not have been allowed to say he had no title, and that the house belonged to the dean and chapter, he having only a permissive occupation. But here the subject-matter of the mortgage is described to be, all that the canonry of him, the defendant, of the king's free chapel at Windsor, and all glebe and other lands, messuages, tenements, and hereditaments belonging thereto."

The operation of an uncertain recital was considered by the Supreme Court of Pennsylvania in a recent case.[1] An action of debt was brought on a bond of indemnity to a sheriff, which recited that he had paid to the defendant a sum of money, the proceeds of the sale of the goods and chattels of one Christian Klusmeyer, under a *fieri facias* "at the suit of the said" defendant. The fact was that the sheriff had had in his possession the goods of several different parties, levied upon under sundry executions against Klusmeyer, and that he had sold under the writ of one Collmar, and not of the defendant. It was alleged by the

[1] Noble *v.* Cope, 50 Penn. St. 17 (1865).

plaintiff that subsequently to the execution of the bond, it was ascertained that the defendant was not entitled to any part of the proceeds of the sale as against the other execution creditors of Klusmeyer; and the present action was brought to recover the money paid, for which the bond had been given. The defendant contended that the plaintiff was estopped by the recital in the bond; but the court overruled the objection.

Woodward, C. J., said that the bond did not assert that the sale was made alone on the defendant's writ; it was a fair construction of the recital that the sale was made on that writ in connection with others. The sheriff's return showed that he levied and sold by virtue of Collmar's writ, as well as by that of the defendant. There was no inconsistency between these facts and the recital in the bond. Estoppel excluded facts inconsistent with itself, but not such as agreed with it. The sheriff, moreover, had not recognized an absolute right in the defendant to the money paid; if he had he would not have taken the bond. The bond stood in the place of the money during the litigation between the execution creditors; and if the effect contended for were to be given to the recital, it would be nullified.

The case of Naglee *v.* Ingersoll[1] contains an instance of the effect of a general recital. There had been a grant of land "along low-water mark to the mouth of Cohocksink Creek before it was diverted and thrown to the north by the erection of wharves."

Mr. Justice Bell, speaking for the court, said: "How far the encroachment infringed on the original course, whether one inch or one hundred feet, is not even hinted at. Nay, it is not expressly averred that it continued to exist at the period of the conveyance, nor is there anything to show, except inferentially, that the defendant could not at once have possessed himself of the whole one hundred and fifty-nine feet conveyed. Without laboring the argument, it is perhaps sufficient to say that the extent and continued existence of the alleged encroachment, being thus left at large, was open to the inquiry of the jury, as matter of fact, both as to its continued existence and its alleged extent. It was certainly competent to the plaintiffs to show that it interfered not with the defendant's possession beyond one inch, and if so, to prove it did not interfere at all; for, the inquiry once entered upon, there was nothing in the deed itself to limit a point at which it should be stayed."

[1] 7 Barr, 185.

This subject is illustrated also in Farrar *v.* Cooper.[1] The question raised was, whether a testator, the grantee in certain deeds of mill privileges, was estopped, by a recital of the existence of another mill-site above, to deny the right of occupancy of it. The court held that he was not estopped.

Though the testator might not be allowed to deny the existence of the mill-site, the chief justice observed, with the privileges and appurtenances belonging to it, still among them the right of prior occupation was not stated as appurtenant to the site. The conveyances were all silent respecting such a right; and the testator by denying it would not necessarily contradict anything stated in them.

The case of Doane *v.* Willcutt[2] will illustrate one of the circumstances under which a recital does not work an estoppel. It was an action for a trespass alleged to have been committed on the plaintiff's close. The parties had been held to be tenants in common prior to an indenture of partition executed by them.[3] The plaintiff attempted to prove his title to the premises, in addition to that under the indenture, by adverse possession for upwards of twenty years. But the defendant, in order to show that the plaintiff's possession was not adverse, introduced in evidence a lease to the plaintiff from Elizabeth Nichols, a widow, of all the land which had been set off and assigned to her as dower in the estate of her deceased husband. Upon resorting to the record of the assignment of dower to Mrs. Nichols, to ascertain what estate was demised by the lease, it appeared that the premises in controversy constituted no part of it. But the defendant objected that this record was inadmissible, on the ground that the plaintiff was estopped by a recital in the indenture of partition that the land therein mentioned had been set off to Mrs. Nichols. The court, however, decided that there was no estoppel.

Mr. Justice Merrick observed that the recital was plainly only a part of the description of the estate upon which the deed was intended to operate, and which was therein otherwise fully and accurately described. The doctrine of estoppel did not apply to such a case. Where several particulars were mentioned and referred to in the description of land conveyed, some of which were found to be erroneous, these might be rejected as a false demonstration, and the other unambiguous and correct parts be

[1] 34 Maine, 394. [2] 16 Gray, 368. [3] 5 Gray, 328.

relied on to fix and determine the rights of the parties under the deed.[1]

So, too, a general and indefinite recital in a replevin bond concerning the amount of property replevied will not estop a surety to show how much of the property in the writ was in fact replevied.[2]

It is held that where a party makes a deed confirmatory of a former one to which he was not a party, he does not thereby adopt the recitals of the former deed, so as to be concluded by them, without language to that effect.[3] In the case cited, in order to prove the bankruptcy of one Brown Shelton, and the assigneeship, recourse was had to two deeds; the former of which recited a sale to have taken place under a commission of bankruptcy against Shelton, and conveyed to the defendant lands sold thereunder by his assignees. To this deed the defendant was not a party. By the latter deed, the defendant, acting upon the former, executed a settlement of the land upon himself after a certain event. The latter deed was silent respecting the bankruptcy. It was contended that the defendant had recognized and adopted the former deed by the latter. But the court held otherwise. Lord Denman said that there was no authority for such a general proposition that a party claiming like the defendant adopted the statements of an anterior deed which went to make up his title.

But a general recital may sometimes work an estoppel; and whether it will do so or not depends upon a proper construction of its terms and the intention of the parties.[4] The case first cited, as stated by Mr. Baron Martin, was an action on a bond conditioned for the performance of covenants by the defendant and H. Warden, in a deed dated in 1847; and the breach was, that they broke a covenant to perform certain works mentioned in the deed. There was a plea, by way of estoppel, in confession and avoidance. The plaintiffs replied, setting out the indenture; and there was a demurrer to the replication. It then appeared that by an instrument under seal, in 1854, the parties stated that, with the exception of certain claims contained in the schedule, the plaintiffs and the defendant and H. Warden had settled, adjusted, and mutually

[1] 1 Greenl. Ev. § 26; Wright *v.* Tukey, 3 Cush. 290.

[2] Miller *v.* Moses, 56 Maine, 128.

[3] Doe d. Shelton *v.* Shelton, 3 Ad. & E. 265, 283.

[4] Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520; Carpenter *v.* Buller, 8 Mees. & W. 209.

satisfied every other account, claim, or demand arising out of the contract on which the action was brought. It was contended that, as the language was general, the effect which the court was to give to it did not depend upon the intention of the parties. The court, however, ruled otherwise.

The learned baron above named said: "Every deed must be construed according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the court cannot look at collateral matters, but the intention of the deed as appearing upon the face of it must be regarded. If in the present case it had appeared that the parties intended to abandon every claim except those referred to in the schedule, the argument on the part of the defendant would have been unanswerable. But when the whole deed is looked at, no such intention appears. The parties intended to refer certain matters to arbitration. They introduce the recital that, 'whereas, with the exception of the claims of the said Charles Warton and Henry Warden contained in the schedule, the said Charles Warton and Henry Warden and the Southeastern Railway Company have settled, adjusted, and mutually satisfied every other account, claim, or demand which the said parties have or hath against each other arising out of the said contract, or any other account, matter, or thing whatsoever, as they the said Southeastern Railway Company and the said Charles Warton and Henry Warden do hereby severally admit and acknowledge; but the claims of the said Charles Warton and Henry Warden, contained and set forth in the said schedule, as well as the amount claimed thereby, are disputed.' And the recital goes on to state that it had been agreed that the claims contained in the schedule should be referred to an arbitrator. The true meaning of the deed is, that the arbitration shall be confined to the matters specified in the schedule; and the admission is made for the purpose of that deed. I do not think that the parties ever contemplated that whatever cause of action either might have against the other should finally cease. A recital in such a deed would be binding, if it was the bargain on the faith of which the parties acted. But that is not the case here. Neither is this an estoppel by means of a recital contained which is the foundation of the action.[1] . . . . The arbitration was a wholly collateral matter. The admission is evidence, and may be strong

[1] See Carpenter *v.* Buller, 8 Mees. & W. 209.

or of very little value, according to circumstances. Here I collect from the deed that it was not the intention of the parties to prevent the plaintiffs from bringing such an action as the present."

Channell, B., observed: "If we could see the parties had agreed to release all other claims in consideration of the agreement to refer, then there might be an estoppel; but that does not appear to have been their meaning. On these grounds the plaintiffs are entitled to judgment. It was said that this is not a question of intention. It may be that when a deed contains a recital of a particular fact in express terms, the effect of the recital cannot be got rid of by showing what the intention of the parties was. But when the language is general, we may collect the intention from the terms of the whole deed; and in that way we have endeavored to arrive at the true construction of the deed in the present case."

The rule respecting the recital of immaterial matters is the same as that in relation to general recitals: it does not work an estoppel.[1] The doctrine seems to rest on that of a case already presented,[2] in which it was held that a party to an instrument under seal is not estopped in an action by the other party not founded on the deed, but collateral to it, to dispute the matters recited; and so the court of New York observed, in the case above cited.

The date of a deed may be denied when it is immaterial, but not otherwise.[3] In the case first cited, "one objection," as Shaw, C. J., says, "to the recovery of the plaintiff is, that his deed to the Rockingham Manufacturing Company bears the date of the 28th of January, 1836, and that the company was not organized until the 10th of February, 1836, though incorporated the November preceding, and in fact this agreement is made the 22d of January, 1836, before the date of the deed and the organization of the company. But we think there are several answers to this objection. A date of a deed may always be controlled by evidence of the actual delivery. Here the agreement recites the deed, and recites

[1] Reed v. McCourt, 41 N. Y. 435; Champlain, &c. R. Co. v. Valentine, 19 Barb. 484. See, also, Deery v. Cray, 5 Wall. 795; Comings v. Wellman, 14 N. H. 287, 293.

[2] Carpenter v. Butler, 8 Mees. & W. 209.

[3] Dyer v. Rich, 1 Met. 180; Cady v. Eggleston, 11 Mass. 282, 285; Kimbro v. Hamilton, 2 Swan, 190. See Washington Co. Ins. Co. v. Colton, 26 Conn. 42.

that it was then made and so made at their request, and this is conclusive that the deed was then made, and the date is immaterial."

It is to this principle that certain cases have been referred, in which it has been held that a mere conveyance of all the grantor's right, title, and interest in a tract of land would not preclude him from proving that he had no right to convey, and from evicting the grantee by virtue of a subsequently acquired title.[1]

The same idea appears in other cases, where a party is not estopped by a statement in a deed, unless it appears that there was an intention that the statement should not be questioned, or that injustice would follow if the court were to allow it to be contradicted.[2] In Hays *v.* Askew, just cited, it was said by Mr. Justice Pearson, that to render a recital an estoppel it must show that the object of the parties was to make the matter a *fixed fact*, as the basis of their action.

The ultimate doctrine upon this point seems to be nearly if not quite identical with the rule that estoppels must be certain. For if a fact should be specially and particularly recited, it would generally carry with it a strong presumption that it had been regarded as material and essential to the contract.

But it would seem on principle that a qualification of this doctrine concerning the conclusiveness of recitals of particular facts might be necessary in case the facts recited were such as to be clearly immaterial, and to have no influence upon the execution of the deed. We have seen, in considering the subject of estoppels by matter of record, that a judgment works an estoppel only in respect to matters essential to the determination of the cause; and that the reason is, that it is presumed that only such matters have been examined with thoroughness.[3] The case of recitals seems analogous. The allegation of a fact in the deed which was of the essence of the contract would be apt to be made with care and deliberation; while a recital of an immaterial fact would in all probability be made with little or no consideration.

[1] 2 Smith's L. C. 709, 6th Am. ed., citing Flagg *v.* Mann, 14 Pick. 467, 481; Blanchard *v.* Brooks, 12 Pick. 47; Frink *v.* Darst, 14 Ill. 304; Right *v.* Bucknell, 2 Barn. & Ad. 278; Kennedy *v.* Skeer, 3 Watts, 95; Miller *v.* Ewing, 6 Cush. 34. This subject will be fully presented in the chapter on Estates by Estoppel.

[2] Hays *v.* Askew, 5 Jones, 63; Southeastern Ry. Co. *v.* Warton, 6 Hurl. & N. 520.

[3] *Ante*, p. 178.

It is upon this principle, it would seem, that it has been held that a recital in a replevin bond that the property was levied upon as A's is not an estoppel to show that it was not A's property.[1] In the case cited, the court said that such a recital was not an express acknowledgment that the property belonged to the defendant in the attachment suit; being simply a recital that the property had been levied on "as" the defendant's, it was no contradiction of it for the obligor to claim the property as his own. But a contrary doctrine has also been held.[2]

In the case of Den d. Brinegar *v.* Chaffin,[3] in the Supreme Court of North Carolina, it was held that there was no estoppel to either party to a deed of bargain and sale to show that one of the bargainors, recited to be a *feme covert*, was in fact a *feme sole* at the time the deed was executed.

Henderson, C. J., speaking for the court, said: "Recitals in a deed are estoppels when they are of the essence of the contract; that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made. As if A recites that he is seized in fee of certain lands, which he bargains and sells in fee, he is estopped to deny that he is seized in fee; for without such seizin it is fair to presume that the contract would not have been made. But if the recital be that he is seized in fee by purchase from C, here neither the bargainor nor bargainee is estopped from averring and proving that he is seized by purchase from D, unless it appear that the seizin in fee, by purchase from C, was part of the contract, and without which it would not have been made. For ordinarily the seizin only is of the essence of the contract, and how and from whom derived are but circumstances. So of every other recital. And this distinction reconciles the many apparent contradictions in the books, some declaring that recitals are estoppels, and others that they are not. In the case under consideration, that the *feme* was the wife of Jacks was not of the essence of the contract. It formed no part of it. It was a mere circumstance of description, more unfavorable to the defendant, or rather the bargainee, than if she had been *sole*. For if *sole*, the deed was effectual by sealing and delivery. If she was *covert*, her

[1] Decherd *v.* Blanton, 3 Sneed, 373.

[2] Bursley *v.* Hamilton, 15 Pick. 40. See also Dezell *v.* Odell, 3 Hill, 215; Mitchell *v.* Ingram, 38 Ala. 395; *ante*, p. 302.

[3] 3 Dev. 108.

private examination was necessary to make it her deed. In truth, her coverture was a fact for which the bargainee neither gave nor received anything. Nor did he on that account receive anything by the deed which he would not have received if she had been *sole*. Neither did it form the basis, nor in any manner move or conduce, to the contract. It is therefore mere matter of evidence, and like all other evidence may be rebutted by contrary proof. . . . .

"But the case does not rest upon general reasoning. If A. S., by his deed, reciting that she is a *feme covert*, when in truth she is a *feme sole*, grants an annuity, it is a good grant, for that is but a void recital, although the grantee had not put it in his writ; and it cannot be a conclusion to him, when he shows the deed.[1] So if a *feme covert*, reciting by her deed that she is a *feme sole*, grant an annuity, this is a void grant, and she shall not be concluded by this recital."[2]

The doctrine of this case seems to be supported also by the cases now to be presented, holding that the acknowledgment of receipt of the consideration in a deed is not conclusive. Mr. Justice Cowen, as we shall see, expressly rests the rule upon the principle above set forth.[3]

2. *Acknowledgment of Receipt of Consideration in a Deed.*

It has been settled for many years that the acknowledgment in a deed of conveyance of the receipt of the consideration is not conclusive, but may be explained or disputed.

The doctrine is discussed in Shephard *v.* Little, decided by the Supreme Court of New York.[4] The action was *assumpsit* for money had and received. The plaintiff offered to prove at the trial that, being in possession of a lease of the value of $500, and that being in debt to a third person in a smaller sum, the defendant agreed to advance him the amount necessary to pay the same, taking in consideration an assignment of the lease, which he was to sell, and pay the plaintiff the difference between the sum so advanced and the sum realized from the sale of the lease; that he, the plaintiff, thereupon assigned the lease, by deed, to the defendant; the assignment stating the consideration to be $500 in hand

[1] Viner's Abr. M. a. 8, pl. 11; Perkins, s. 40.

[2] Perkins, s. 41, note.

[3] *Post*, p. 316.

[4] Shephard *v.* Little, 14 Johns. 210.

paid. The defendant objected to the introduction of this evidence; but the court held that it was admissible, reversing the decision of the Common Pleas.

Mr. Justice Spencer thus stated the opinion of the court: "The case of Schermerhorn *v.* Vanderheyden[1] is referred to, to show that the court below decided correctly. If that case is well understood, it warrants no such conclusion. The case of Preston *v.* Merceau[2] was cited and relied on by the court. In that case it was decided that parol evidence was inadmissible to prove an additional rent payable to a tenant, beyond that expressed in a written agreement for a lease, and Blackstone, J., said: 'Here is a positive agreement that the tenant shall pay £26; shall we admit proof that it means £28 12*s.* 6*d.*?' But he added, as to collateral matters it might be otherwise; he might show who is to put the house in repair, or the like, concerning which nothing is said. But he cannot shorten the term, or alter the rent. In Maigley *v.* Hauer,[3] we refused to admit parol evidence of a consideration of a different nature from that expressed in the deed of conveyance. The evidence offered in this case steers clear of the principles adopted in the cases cited. Here the plaintiff does not attempt to set up a different consideration from that expressed in the deed of assignment. He merely offered to show that it was not paid, and that the amount to be paid him for the assignment was to depend on an event subsequently to happen, to wit, the sale by the assignee of the property assigned. . . . .

"The date of a deed, and whether the consideration was paid or not, are facts open for inquiry, by parol proof. If notes of hand, which are of no higher nature than verbal promises, and are classed among parol contracts, were given for the consideration money of a conveyance of land, could there be any doubt that such notes would be recoverable when the deed expressed that the consideration was paid in land? Yet it is certain that between the contracting parties you may inquire into the consideration of a note. If so, then you could show that they were given for the land conveyed; and by showing that the consideration was confessed to be paid by the deed, a recovery would be defeated by the higher proof arising from the deed. But this is not the case; and though when one species of consideration is expressed you cannot prove another or different one, and although you cannot by parol

[1] 1 Johns. 139. [2] 2 Wm. Black. 1249. [3] 7 Johns. 341.

substantially vary or contradict a written contract, yet these principles are inapplicable to a case where the payment or amount of the consideration becomes a material inquiry."[1]

It will be seen, however, that the courts have gone still further, in many instances, and allowed the parties to prove an altogether different consideration from that expressed in the deed.[2]

This question came before the Court of Errors of New York in McCrea *v.* Purmort.[3] In this case the consideration in a deed of lands was alleged to be money paid, and the court allowed evidence to show that, instead of money, the consideration paid was *iron*.

Mr. Justice Cowen, who delivered the judgment, after showing that there had been much conflict on the subject, both in New York and elsewhere, said: "A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything which it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed; nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations. And by analogy the acknowledgment in a deed that the consideration had been received is not conclusive of the fact. This is but a fact; and testing it by the reason of the rule which we have laid down, it may be explained or contradicted. It does not *necessarily* and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by parol, because it extinguishes a pre-existing right; but no receipt can have the effect of destroying, *per se*, any subsisting right; it is only *evidence* of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment, but it is the extinguisher itself.[4]

[1] See Abbott *v.* Marshall, 48 Maine, 44.

[2] Irvine *v.* McKeon, 23 Cal. 472; Coles *v.* Soulsby, 21 Cal. 47.

[3] 16 Wend. 460.

[4] "In speaking of a written release as an extinguisher of itself, I do not understand him to mean the releasing clause in a conveyance which usually accompanies an acknowledgment of the receipt of the money, but an absolute, separate, and distinct release." Miller, J., in Stackpole *v.* Robbins, 47 Barb. 212.

"The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment in the deed is generally merely formal."

In Massachusetts it has also been held from an early day that the acknowledgment of receipt of the consideration in a deed is not conclusive, but may be explained or denied.[1] The case first cited was an action by the grantor of land against the grantee to recover a part of the consideration money, the whole of which was expressed to have been paid; and the court sustained the action.

The chief justice said that this was a merely formal part of the deed, and that it received so little attention that to consider it conclusive would be unjust. Moreover, a receipt was always open to explanation; and though the acknowledgment in the present case had been made under seal, it was nothing more than a receipt; for the seal gave it no additional solemnity.[2]

A deed of satisfaction of a debt is a good discharge of the same, regardless of the amount of consideration.[3] The case first cited was an action for £103, money had and received. The defendant produced a deed of assignment to himself of the whole sum, in consideration of £100 12*s.* in hand paid at or before the delivery thereof; "and on the back of the deed was a receipt signed by the plaintiff, reciting that he had received the within-mentioned sum of £100 12*s.* on the day and year aforesaid." There were strong marks of suspicion upon the trial that the consideration had been falsely recited, and that the money never was paid. A verdict having gone for the defendant, the court refused to grant a new trial.

In Harding *v.* Ambler, just cited, the plaintiff brought *assumpsit* to recover the balance of certain interest claimed to be due on the sale by the plaintiff to the defendant of a policy of life insurance. Among other pleas, the defendant pleaded a release by indenture for all the money due in respect of the purchase of the

[1] Wilkinson *v.* Scott, 17 Mass. 249; Gale *v.* Coburn, 18 Pick. 397; Clapp *v.* Tirrell, 20 Pick. 247; Livermore *v.* Aldrich, 5 Cush. 431; Preble *v.* Baldwin, 6 Cush. 550; Clark *v.* Deshon, 12 Cush. 589; Paige *v.* Sherman, 6 Gray, 511; Miller *v.* Goodwin, 8 Gray, 542.

[2] See Rex *v.* Scammonden, 3 Term, 474.

[3] Heath, J., in Rewntree *v.* Jacob, 2 Taunt. 141. See Harding *v.* Ambler, 3 Mees. & W. 279.

policy. It seems that in calculating the interest, a mistake had been made to the amount of £34 against the plaintiff; and it was to recover this that the present action was brought. It was contended for the defendant that the plaintiff was estopped by the execution of the indenture. On the other hand, it was said that the release did not operate to deprive the plaintiff of his right of action. The present claim for interest arose on an agreement collateral to that upon which the policy was purchased and the principal money made payable. But the court decided in favor of the defendant.

Lord Abinger, C. B., said: "The release, in words, applies only to the principal money, £2,290; and the question is, whether after the plaintiff had stated that to be the purchase-money, and executed a deed releasing it, he can be let in to prove that it was more. The conditions of sale stipulated that the purchase-money is to be paid on or before the 8th of June, 1835; if it is not, the purchaser is to pay interest upon it at a certain rate from that day. If the stipulation had been merely that the party should pay the principal money on the 8th of June, nothing being said about interest, and when that day arrived, the money not being paid, an agreement had been then come to, that for that default interest should be paid, Mr. Kelly's argument would have been correct; that would have been a collateral agreement. But this is a contract in which interest is as much included as principal."

A case has, however, arisen in Pennsylvania requiring a qualification of the general rule.[1] It was an action of trespass *quare clausum fregit*. The facts were that the defendant agreed to convey the premises to the plaintiff, provided a certain piece of land should be given him (defendant) by his father by will. The bargain was consummated, and a deed given reciting the consideration as money paid; and the will desired was executed. The defendant offered to prove at the trial that no money passed, contrary to the terms of the deed; but he was not allowed to do so.

The court, Lewis, C. J., said: "The principle which seems to govern this case is, that where a vendor, without fraud or mistake, accepts of the engagement of a third person for the consideration agreed on, and on the faith of such engagement acknowledges the

[1] McMullin *v.* Glass, 27 Penn. St. 151.

receipt of the consideration, it is against equity that he should be permitted to defeat the operation of the grant by showing that the consideration was not paid. As between the vendor and vendee, the consideration is to be treated as fully paid, and the vendor is estopped from denying it."

CHAPTER XI.

PRESUMPTION FROM JOINT EXECUTION OF DEED.

We have now considered the conclusiveness of that part of the deed containing the recitals. We pass next to consider the effect of a joint execution of the deed, unqualified by language indicating an intention to assume any different relation from that which the execution naturally imports.

The subject was considered in Stimpson *v.* Thomaston Bank.[1] The precise question raised in this case was, whether, in the case of a deed of land by two grantors, but not designating the manner in which the land was held by them, the grantee was estopped to show that one of the grantors was seized in severalty of a larger moiety than the other. The court decided the question in the affirmative.

"The deed is joint," said Mr. Justice Tenney, "and the grantors profess to convey the whole land, and not each a distinct parcel. The covenant of seizin is also joint. Stimpson covenants that he and Elizabeth Sawyer are both seized of the whole land; and Elizabeth Sawyer does the same. An individual taking upon himself an obligation, or entering into a promise, covenants or promises in writing accordingly, is bound by such undertaking, and he cannot successfully resist his liability by the introduction of other proof, if inconsistent with the certain, direct, and precise terms of the contract. . . . . If two persons give a joint bill of sale of two distinct chattels, receive the consideration therefor, and make delivery of the same, both vendors are equally bound to make good the damage, if the title to either should fail, though one might have been the exclusive owner of one, and the other of the other chattel before the sale; and it is not perceived that a covenant would not be equally broad."[2]

There has been some conflict as to whether one who has signed his name to a sealed instrument as a joint obligor may show, as

[1] 28 Maine, 259, 269.

[2] See Hamblin *v.* Bank of Cumberland, 19 Maine, 66.

against the obligee, that he was a surety. The point has been decided in the affirmative in Ohio.[1]

In the case first cited, the court say: "The other point now submitted to us for decision is, whether the obligor is estopped by his bond from showing his relation as surety, except where the face of the instrument affords evidence of the fact. The doctrine of estoppel proceeds upon the ground that an obligor is concluded, at law, by his own admissions, under his own seal, in the instrument against which the objection is alleged. But there is no attempt here to deny the obligation of this paper, or to evade its admissions. Nothing appears on its face inconsistent with the suretyship of the defendants. The defence sets up a distinct and independent fact, beyond the terms of the writing, not controverting any of its stipulations. If the obligation recited that the obligors were principals, there might be color for the assumption that the admission concludes them. In the absence of such recital, we find nothing to stop them from proving the truth."

But the Supreme Court of the United States have held the contrary doctrine.[2] In the case first cited, they say that the rule seems to be well settled, that where principal and surety are bound jointly and severally in a bond, although there be no express stipulation on the face of the instrument that all are principals, yet neither of them can aver that he is surety only.[3] The case first referred to was before the same court again four years later, and the doctrine declared on the former occasion was reaffirmed.[4]

The weight of authority seems to be upon this side; but at all events there can be little doubt that the evidence should be excluded if the obligee has, in good faith, acted upon the belief that the defence of suretyship would not be raised.

A surety in a bond stands on the same ground with his principal as to the right of denying the validity of the instrument. In Collins *v.* Mitchell,[5] an action was brought against a surety in a replevin bond, to which he attempted to set up the defence that, at the time of, and prior to, the institution of the attachment suit in

[1] Bank of Steubenville *v.* Hoge, 6 Ohio, 17; Bank of Steubenville *v.* Leavitt, 5 Ohio, 207. See Harris *v.* Brooks, 21 Pick. 195; Bell *v.* Banks, 3 Scott, N. R. 497; Stone *v.* Compton, 5 Bing. N. C. 142; Farmers' & M. Bank *v.* Rathbone, 26 Vt. 19, 34; S. C. Redf. & B. L. C. 581.

[2] Sprigg *v.* Bank of Mt. Pleasant, 10 Peters, 257.

[3] Rees *v.* Barrington, 2 Ves. Jr. 540; People *v.* Jansen, 7 Johns. 337.

[4] 14 Peters, 201. See also Cox *v.* Thomas, 9 Gratt. 312.

[5] 5 Fla. 364.

which the bond was given, the defendant therein and principal in the bond was dead. But the court held the surety estopped to set up the defence, and referring, among other cases, to Cutler *v.* Dickinson,[1] in which the sureties in an administration bond were held estopped by the recital that their principal had been regularly appointed.[2]

The result of the cases upon this point is thus stated by the American editors of Smith's Leading Cases:[3] "It is well settled that no one who has bound himself by an instrument under seal for the fidelity and good conduct of another, in a private trust or public duty, can escape from the liability thus assumed, under cover of an allegation that his principal was not duly designated or elected, or was subject to some legal disqualification which should have prevented him from accepting or administering the office.[4] The estoppel is, in these instances, equitable as well as legal, because it would obviously be unjust to permit a person who has aided another to obtain access to a place of trust by a pledge that he will behave himself properly when there, to point out the reasons why he should not have been admitted, after it is too late to correct the error."[5]

[1] 8 Pick. 386.

[2] See also Cox *v.* Thomas, 9 Gratt. 314; Cecil *v.* Early, 10 Gratt. 198.

[3] Note to Duchess of Kingston's Case, 2 Smith's L. C. 708, 6th Am. ed.

[4] People *v.* McCumber, 27 Barb. 632; Seiple *v.* Elizabeth, 3 Dutch. 407; People *v.* Norton, 9 N. Y. 176.

[5] The learned editors observe, in the same connection, that there is less difference between legal and equitable estoppels, that is, estoppels by deed and *in pais*, than might first appear, and that both rest ultimately on the same principle. They cite Jackson *v.* Waldron, 13 Wend. 178, 206.

CHAPTER XII.

ESTATES BY ESTOPPEL.[1]

THE subject upon which we now enter presents the most remarkable and the most complicated doctrine in all the "curious learning" of estoppel. An estate by estoppel arises, in general terms, in a case where a grantor, without title, makes a lease or conveyance of land by deed, and subsequently, by descent or purchase, acquires the ownership; which after-acquired title of the grantor enures by estoppel to the benefit of the grantee. And this is the doctrine which we are now to examine and endeavor to explain.

By the common law, only four kinds of assurances have in themselves possessed the efficacy to pass an after-acquired estate, the feoffment, the fine, the common recovery, and the lease. The last-named is the only one of these that has come down to us and is now in use. The common recovery long since became obsolete, and seems to have left little or no trace of its existence in America. The fine was substantially an acknowledgment of a feoffment of record, but we pass it as affording no independent aid to our present inquiries, and proceed to the consideration of the first-mentioned and most important species of assurance, the feoffment.

This manner of conveyance, as it is said in the Touchstone,[2] was the most ancient kind of conveyance, and in some respects exceeded that by fine or recovery; for it was of such a nature and efficacy, by reason of the livery of seizin ever inseparably incident to it, that it removed all disseizins, abatements, intrusions, and other wrongful and defeasible titles, and reduced the estate clearly to the feoffor, and through him to the feoffee, when the entry of the feoffor was lawful; which neither fine, recovery, nor bargain and sale by deed indented and enrolled would do, when the feoffor was out of possession by disseizin. And the learned editor of the Touchstone, Mr. Preston, in a note to this passage, says that to make a feoffment good and valid nothing was wanting but pos-

[1] Chapter IX. of Rawle on Covenants for Title is strongly recommended for study in connection with the following pages.

[2] Page 203.

session ; and when the feoffor had possession, though entirely naked, yet a freehold or fee simple passed by it, as against the feoffor, by reason of the livery.

The feoffment passed not only all present estates and interests of the feoffor, but also barred and excluded him (and his heirs prior to the statutes *de bigamis*[1] and *quia emptores*[2]) from all future estates, rights, and possibilities in favor of the feoffee.[3] This effect of barring all future interests was produced, it is said, by the presence of the word *dedi* in the charter of feoffment, which word imported a warranty to defend the estate.[4] We must now ascertain the character and operation of this ancient warranty.

As defined in the work to which we are constantly referring,[5] the warranty was a covenant real, annexed to an estate of freehold or inheritance, whereby a man and his heirs were bound to warrant the same, and either upon voucher or by judgment in a writ of *warrantia chartæ* to yield other lands and tenements to the value of those of which there should be an eviction, in which case the party received a compensation for the lands lost; or the warranty might be by way of rebutter, in which case it operated as a defence to the possession.[6]

The effect of the warranty was to bar and conclude the warrantor personally, and before the statutes already mentioned, his general heirs, as distinguished from heirs in tail, of the land so warranted forever, so that all his rights, present and future, were bound.[7] "And therefore," in the example given in the Touchstone, "if the father be disseized, and the son in his lifetime release all his right to the land to the disseizor, and make a war-

[1] 4 Edw. 1, ch. 6.

[2] 18 Edw. 1, ch. 1.

[3] Touchstone, 204.

[4] Ib. 184; Coke Litt. 383, 384.

[5] Touchstone, 181.

[6] The subject is more fully explained by the great commentator. "By the feudal constitution," he observes, "if the vassal's title to enjoy the fee was disputed, he might vouch, or call the lord or donor to warrant or insure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee by the feudal verb *dedi*, to hold of himself and his heirs, by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered..... But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure, and of course the ancient services, resulting back to the superior lord of the fee." 2 Black. Com. 300.

[7] Touchstone, 182.

ranty in the deed, and then the father dieth, and the right descendeth to the son, albeit the release doth not bar the son, yet the warranty doth bar him."

In the case of assets, the warranty, if lineal, was a bar of an estate in tail against the heir; and if the warranty was collateral, it was a bar with or without assets (except in cases provided for by statute) of an estate in fee simple or fee tail, and all possibility of right thereunto.[1]

And in either sort of warranty, if the warrantor should implead the warrantee, the latter, the tenant, might show the warranty and demand judgment whether, contrary to the warranty, the warrantor should be suffered to demand the thing warranted; and this was called a rebutter. This rebutter was given as a defence to the title to avoid circuity of action; since if the demandant were to have recovered, contrary to the warranty, the other party would recover the same lands, or lands of equal value, by force of the warranty.[2]

The warrantee again might, at any time before he was impleaded for the land, bring a writ of *warrantia chartæ* upon the warranty in the deed, against the warrantor or his heirs; and by this proceeding all the land that the heir had from the ancestor was bound and charged with the warranty, in the hands of all persons to whom it should afterwards go, from the impetration of the writ; so that if the land warranted should afterwards be recovered from the warrantee, he should be entitled to recover of other lands of the heir, or of the warrantor if living.[3]

Mr. Preston suggests that this shows the superiority of the ancient warranty over the modern; for in the former case, by the proceeding of the *warrantia chartæ*, the lands were rendered unmarketable from the time of the writ, or at least the judgment would, on the sale of the lands bound by the *warrantia chartæ*, render it necessary to investigate the title to the lands on which the warranty had attached, — a state of things which could not be produced by the modern warranty.[4]

Without entering into any detailed examination of the subject of warranties,— since it does not come within the scope of this

[1] Ib. At the present day the heir is not affected by the warranty, if he be without assets, except by way of rebutter; which subject we shall consider in the subsequent pages.

[2] Coke Litt. 265; Touchstone, 182.

[3] Touchstone, 184.

[4] Ibid.

work, — the foregoing observations will be sufficient to show that the ancient warranty was a very different affair from the warranty in our modern deeds of conveyance.[1] This latter, indeed, is a mere covenant, — personal or real, according as it affects only the grantor or embraces and descends to the heir, — and its only operation is, either to give a ground of action for damages in case of a breach, or to rebut the covenantor and those for whom he covenants, should they set up a claim to the land against the covenantee. In this latter character, it bears a strict analogy to the ancient common-law warranty, operating as a sort of estoppel; and in this character alone we shall have occasion to examine its effect.

The old doctrine of the common law respecting estates by estoppel is given in a comprehensive form by Mr. Preston,[2] which we shall transfer in substance to these pages.

The learning of estoppels and warranties, he observes, affords an exception to the general rules, qui non habet, ille non dat, and nemo potest plus juris in alium transferre quam ipse habet. Though a stranger, or an heir-apparent, or a presumptive heir, cannot grant as such, yet he may, by estoppel, bind any interest which he may afterwards acquire.

But different assurances will have different operations by way of estoppel. An indenture of *lease*, or a fine *sur concessit*, for years, operates at first by way of estoppel, and finally, when the grantor acquires an ownership, it attaches the seizin, and creates an interest, or produces the relation of landlord and tenant. The term commences by estoppel, but the after-acquired interest renders it for all purpose an estate; and it binds the lessor, his heirs and assigns, and the lessee and his assignees.[3]

A *feoffment* by a person who is not the owner passes of necessity a fee by wrong or disseizin. It binds the feoffor for his life, by estoppel; so that he can never claim the land, though it should descend to him. He cannot purchase the fee, since his feoffment

[1] This is true of the express warranty formerly used, as well as of the implied warranty contained in the feoffment and fine. The form of the express covenant was this: "Ego, J. S. et heredes mei warrantizabimus et in perpetuum defendemus W. S. et heredibus suis tenementa predicta contra omnes homines in perpetuum." Touchstone, 181. And this seems to have been the force of the warranty implied in the feoffment. Ib. 185, *passim*.

[2] 2 Preston, Abstracts, pp. 210–217.

[3] The efficient word in the lease was the word *demise*, which imported a covenant for quiet enjoyment against all persons. Touchstone, 160.

is a disseizin of the owner. But the feoffment is now an estoppel only to him personally; it will not bind his heirs by its own proper operation. Mr. Preston now quotes the remarks of Lord Coke,[1] as follows: "There is a diversity between a warranty and a feoffment; for if there be a grandfather, father, and son, and the father disseizeth the grandfather, and makes a feoffment in fee, the grandfather dieth, the father against his own feoffment shall not enter; but if he die, his son shall enter. And so note a diversity between a release, a feoffment, and a warranty. A release in that case is void; a feoffment is good against the feoffor, but not against his heir; a warranty is good both against himself and his heirs. And if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors *release* all their right and title in the land to the heir, this is void; for that they have neither right nor title to the land, but only a bare authority, which is not within Littleton's case of a release of right; and so it is if *cestui que use* had devised that his feoffees should have sold the land, albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery."[2]

By a warranty annexed to an estate which passed by a feoffment, the heir, so far as he claimed as heir, might be barred by force of the warranty as a rebutter, though not bound by the feoffment; and the bar of the heir was to avoid circuity of action.[3]

As to *fines*, it was agreed in Edwards *v.* Rogers[4] that a fine by a stranger or heir-apparent, who afterwards by purchase or descent became owner, would bind him and his heirs; and in short all the books agree, Mr. Preston says, that a person who claims as heir to the conusor in a fine cannot, as heir, avoid a fine by a plea of *partes nihil*, etc. But to bind the heir, he must have claimed in the character and right of heir of the person by whom the fine was levied; if he claimed in any other way, there was no bar.

A mere *grant* as such, or a *release*, or a surrender of copyhold lands, will not operate by way of estoppel, without warranty. Equity, however, will consider a lease or alienation by a person before he was owner as binding on him when he becomes owner.[5] But the equity was, in Morse *v.* Faulkner,[6] treated as *personal*

[1] 1 Inst. 265.
[2] 1 Inst. 265 b.
[3] 1 Inst. 265 a.
[4] Sir W. Jones, 456.
[5] Wright *v.* Wright, 1 Ves. Sr. 409; Beckley *v.* Newland, 2 P. Wms. 82. The last case has been doubted by Lord Eldon. Harwood *v.* Tooke, 1 Madd. Ch. 437.
[6] 1 Anstr. 11.

against the heir, and not as binding on his estate, so as to give a right against the succeeding heir; but the point was not decided. Equity, however, carries its practice further than the law carries its rule. At law, no lease or other assurance, which operates in the first instance as and by way of conveyance, can be used by way of estoppel (without warranty) to bind any estate subsequently acquired, though the lease or conveyance does not confer the degree of interest it imports.[1] In these instances, the rule of law is *cessante statu*, etc., except, indeed, a tortious alienation by feoffment, fine, or recovery, be made by a tenant at will, for years, or for life, or a discontinuance be made by a tenant in tail.

But in equity, if a man who has a term for ten years make a lease for twenty years, or a person having an estate for life or in tail make a conveyance in fee, and afterwards acquires the fee, he will, if the transaction be founded on a valuable consideration, be bound by way of further assurance to give effect and confirmation to the original lease or alienation.

Such is the general doctrine of the common law as stated by Mr. Preston, a writer of great authority.

We turn now to the modern doctrine; and first of leases by estoppel.

1. *Leases. Where no Interest passes, an Estoppel arises.*

One of the most important doctrines in estoppels by deed is this, that where no interest passes, an estate by estoppel is created between the parties and those claiming under them, in case of a subsequent acquisition title by the grantor. Or in the example put in the familiar case of Trevivan *v.* Lawrence,[2] if a man makes a lease, by indenture, of D, in which he hath nothing, and afterwards purchases D in fee, and suffers it to descend to his heir, or bargains and sells it to A, the heir or A shall be bound by this estoppel, and so shall the lessee and his assignee. For when an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel.

Mr. Preston,[3] in speaking of this doctrine, says that the lease first operates by way of estoppel, and finally, when the grantor ob-

[1] We shall note some qualification to this rule in modern conveyances, in a subsequent portion of this chapter.

[2] 1 Salk. 276; S. C. 6 Mod. 258; 2 Ld. Raym. 1036.

[3] 2 Preston, Abstracts, p. 210, as cited by Tindal, C. J., in Webb *v.* Austin, 7 Man. & G. 701, 724.

tains an ownership, it attaches on the seizin and creates an interest, or produces the relation of landlord and tenant. There is a term *commencing* by estoppel, but for all purposes it becomes an estate or interest. It binds the estate of the lessor, and therefore continues in force against him and his heir. It also binds the assigns of the lessor and the lessee.

In another work which Tindal, C. J., in the case above cited, says has always been considered as a work of great authority,[1] the following case is given: "If A mortgage land to B, upon condition to re-enter on payment of £10, and after, A, before the day of payment comes, being in possession, makes a lease for years, by indenture, to C, and then afterwards performs the condition, this shall make the lease to C good against himself by estoppel; and it was further adjudged that even the feoffee of A shall be bound by this lease, which took its effect only at first by estoppel; because he, coming in under one who is estopped, should be himself estopped; which was still a stronger case than the first. And this was adjudged in Ireland, and afterwards affirmed on a writ of error here."

It was determined in Webb *v.* Austin[2] that the purchase of land by the grantor of a lease who had no title when the lease was executed converts that which before was a lease by estoppel into a lease in interest. What this means will appear by a statement of the case referred to. The action was brought to recover a deposit paid by the plaintiff as purchaser upon a sale by auction, on the ground that the vendor had not made a sufficient title. The facts in substance were these: The vendor of the property having mortgaged the premises to A, made a lease of them to B, before the mortgage was paid. Subsequently he (the vendor) put up the premises for sale at auction, and the plaintiff purchased; the mortgagee agreeing to execute any conveyance which might be necessary to make a good title to the purchaser.

It was contended on the part of the plaintiff that the defendant had by the mortgage parted with his entire legal interest in the land, and that a purchaser from him would have no remedy against the lessee or his assignee for a breach of the covenants in the lease; and for this position Whitton *v.* Peacock[3] was cited. But the objection was overruled. By the concurrence of the

[1] Bacon's Abr. Leases (O).

[2] 7 Mees. & W. 701.

[3] 2 Scott, 630; S. C. 2 Bing. N. C. 411.

mortgagee with the vendor, the lease, which before was purely an estoppel, became an estate in interest, giving the plaintiff protection in the purchase.[1]

It is said to have been supposed in England[2] that in Whitton *v.* Peacock[3] the court were of opinion that if a man who has only an equitable estate demises by deed, and then conveys the reversion, the assignee cannot maintain an action on the covenants in the lease. But Mr. Baron Parke[4] says that the court did not intend so to decide.

The question was finally settled in Cuthbertson *v.* Irving.[5] In that case a mortgagor in possession, having only an equity of redemption in the premises, made a lease, and assigned all his title to a third person. The latter sued the tenant on his covenant for repairs, and it was held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the tenant could not deny the right of the lessor to make the lease by showing that he had no legal estate in the premises, and that the estoppel continued in favor of the plaintiff, though the assignment to him showed that the lessor had no legal title.

In delivering judgment in the Exchequer Chamber, Wightman, J., said: "The lessor in this case, being a mortgagor in possession at the time of the granting of the lease, had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee, is only by estoppel, and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case, if the plaintiff had declared in the old form, he would have stated the lessor to have been seized in fee, which according to the cases might have been traversed; and if it had, and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found? The answer is, for the plaintiff, because the lessee is estopped from denying that the plaintiff had such a *legal* estate as would warrant the lease; and as no other legal estate or interest is shown to have been in the lessor, it must be taken

[1] The court referred especially to a note from Lord Hale's MSS., and to Weale *v.* Lower, Pollexf. 54.

[2] Note to Walton *v.* Waterhouse, 2 Wms. Sand. 831, ed. of 1871.

[3] 2 Scott, 630; S. C. 2 Bing. N. C. 411.

[4] Gouldsworth *v.* Knights, 11 Mees. & W. 337, 343.

[5] 4 Hurl. & N. 742; S. C in error, 6 Hurl. & N. 135.

as against the lessee, by estoppel, that the lessor had an estate in fee." [1]

The court, however, said that the case would have required a different ruling if the nature of the lessor's interest had appeared on the face of the lease. And this distinction was made in a subsequent case of *ejectment* involving the point.[2] In that case one Waine joined with one Tyrer in executing an indenture of mortgage; but that instrument recited that by a prior indenture the premises were assigned by Waine to Tyrer, subject to redemption on payment of £1,790.

Mr. Baron Martin said he was clearly of opinion there was no estoppel. It was true that if a person should read the last indenture, without knowing anything more of the matter, he might come to the conclusion that Waine was the legal owner of the reversion. But reading the prior indenture, it was clear from the recital that the legal owner of the reversion was Tyrer, and that Waine joined in the conveyance as mortgagor for another purpose.

A similar decision was rendered in Pargeter *v.* Harris,[3] which was an action for breach of covenant for the non-payment of a semi-annual instalment of rent, — the indenture showing that the plaintiffs had not a legal reversion.

The above cases, it will be noticed, were either actions of ejectment, in which it is necessary, in order to a recovery, that the plaintiff should be possessed of a legal estate, or of covenant, which is enforceable as an obligation at law.[4] It was held in the Exchequer Chamber, on appeal from the Queen's Bench, in the very recent case just cited, in which this technical obstacle did not arise, that the estoppel there was not obviated by the fact that the deed showed that the landlord possessed no legal reversion. In this case, it appeared from the deed that the defendants were second mortgagees, to whom the plaintiff had attorned. In this state of things the defendants had distrained for rent; and the question was, whether the distress were valid. The court decided in the affirmative, making the distinction above mentioned, and overruling anything in the cases which might lead to a contrary view. The case of Jolly *v.* Arbuthnot,[5] very similar in its facts, was referred

[1] In the judgment in this case delivered in the court below, by Martin, B., the cases, which are somewhat conflicting, are reviewed.

[2] Saunders *v.* Merryweather, 3 Hurl. & C. 902 (1865).

[3] 7 Q. B. 708. *Ante*, p. 294.

[4] Morton *v.* Woods, Law R., 4 Q. B. 293, 303 (1869).

[5] 4 De G. & J. 224 (1859).

to with strong approval, and the following language of the Lord Chancellor adopted: "It appears to me that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties, which it embodies, should be carried out, either by giving effect to their intentions, in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done." If Pargeter *v.* Harris is not overruled by these cases, the distinction is a nice one.

This subject — a somewhat necessary digression here — will be more fully presented in Part III.

We must now consider the converse of the rule in the above cases; for though it does not strictly present the subject of an estate by estoppel, it is still so intimately connected with the subject just considered that any separation would seem unnatural and forced.

2. *Leases. Where an Interest passes, no Estoppel arises.*

The converse of the rule in the foregoing cases is also true, that where an interest passes by the deed there is no estoppel.[1] Doe d. Strode *v.* Seaton was an ejectment to recover certain premises in the city of Bristol, against the assignee of a lessee for years. It appeared that the lessee had covenanted to pay rent and deliver possession of the premises at the end of the term to the lessor, his heirs and assigns. The action was brought by the devisee of the lessor, after the expiration of the term. The assignee proposed to show that the lessor was only tenant for life of the premises; while the plaintiff contended that he was estopped by the deed. The court ruled in favor of the defendant.

"Is there any case," said Mr. Baron Parke, "which establishes that the words of such a covenant make any difference? Who could have sued for a breach of this covenant, for not giving up possession at the end of the term? It was not a covenant running with the land, and therefore the heir could not sue. This lease does not operate as an estoppel, because Colonel Strode, having a life estate, had a right to grant a lease for twenty-one years, determinable upon his life, and therefore an interest passed; and where an interest passes there is no estoppel. In Coke Litt.[2] it is said, 'A lessee for the life of B makes a lease for years, by deed

[1] Coke Litt. 47 b; Doe d. Strode *v.* Seaton, 2 Crom. M. & R. 728.

[2] 47 b.

indented, and after purchases the reversion in fee; B dieth; A shall avoid his own lease, for he may confess and avoid the lease which took effect *in point of interest*, and determined by the death of B.' That case is similar to the present, except that there the reversion was purchased by the lessor instead of the lessee. That shows that an interest passes, and then there is no estoppel."

This question again arose in a recent case,[1] in which the vice-chancellor thus stated the doctrine: "One point arising in this case is free from doubt. It was conceded that if a termor, or the owner of any estate in land, which might possibly be sufficient to allow an interest created by his deed to take effect out of such estate, make a deed purporting to grant such interest, which in the event fails to some extent, from the circumstance of the grantor's own estate not being of sufficient duration to enable the grantee to take all that the deed purported to give him, — as in the [above] illustration in Coke Litt., if a tenant for life were to demise for a term, and then to die during the term, — an actual interest will pass by the grant, and the grantee will not be estopped from showing the determination of such interest, as by the death of the grantor during the term; that is to say, admitting that the lease was for a term of so many years, he would be at liberty to prove that the lessor had only a life interest, and that accordingly, by his death, the lease had determined. For though it is an admitted principle that the lessee cannot dispute the title of his landlord, it is equally clear that where he can confess and avoid it, by showing that the landlord's estate has determined, he is permitted to do so, and thus prove that the lease exists no longer.[2]

"In truth, the question in this case is, whether or not there is any reversion on which the purchaser of the ground rent would have a right to proceed for its recovery by distress or re-entry. As respects the reversion, the case is in a singular position. Unquestionably, a termor who grants a lease longer than his term thereby parts with his whole interest; and during the term of the original lease the tenant would hold of the owner in fee simple, who had granted the original lease; but the argument is, that on the subsequent acquisition of the fee simple by the original lessee,

[1] Langford *v.* Selmes, 3 Kay & J. 220.

[2] But if the devisee, in his declaration, allege the *reversion* to belong to the lessor and heirs, the defendant must traverse it; for to confess and avoid, would be to admit the existing title in the devisee. Weld *v.* Baxter, 1 Hurl. & N. 568, in Exchequer Chamber, per Crompton, J.; S. C. 11 Ex. 816.

an estoppel arose, by which, on the expiration of the original lease, the supposed under-lessee will hold of the under-lessor who had affected to demise to him, at a rent of £6, for a term greater than he was possessed of at the date of the under-lease. There is no authority for such a proposition; and the only argument in favor of it has been that, although there is not a complete estoppel where there is an interest which might be sufficient to effect the whole object of the deed, yet where the interest was *ab initio* insufficient, there, in order that the deed may not lose its effect, the parties are estopped from saying that the actual interest which it purported to grant has not passed. The only authority which has been cited is Gilman *v.* Hoare,[1] which was of a different character. That was a case where a person having a reversionary interest made a grant, and it was supposed, from the report in 1 Salkeld, that an interest there passed by way of estoppel during the first period, and out of the estate during the latter period of the demise. It appears, however, from another report of the same case[2] (and it is impossible therefore to treat it as an authority), that there was no interest at all, because there had been no attornment in respect of the original interest of the lessor which he purported to grant, and therefore, the lessor having no interest, the rule applied that a lessee cannot say that his lessor had no interest at the time of making the lease, and accordingly there was a perfect estoppel as between the lessor and the lessee; and therefore there was no difficulty in that case, because the true reason of the rule is, that a lessee, having accepted a lease, cannot plead to an action by his lessor that the lessor *nil habuit in tenementis*. That is the principle of estoppel; but I never heard it doubted that, where a person has granted a lease exceeding in duration the actual term which he held; the effect of that would be a demise of the whole term, so that the grantee would hold of the grantor of the original term, out of which the under-lease was intended to be made."

The rule is stated in terms substantially these, by a writer of high authority:[3] that although it is a general rule that a lessee by indenture is estopped from alleging that the lessor had no interest in the demised premises during the joint lives of the lessor and the lessee, yet if, in fact, the lessor was only tenant for life, the lessee may say so in answer to an action of covenant against him

[1] 1 Salk. 275.

[2] Said to be in 3 Salk. *Sed qu.*

[3] Sir E. V. Williams, in note to Walton *v.* Waterhouse, 3 Saund. 419.

by the *heir* of the lessor. And the following examples are given: where covenant was brought upon a lease for years by the plaintiff as heir in reversion in fee to his father, and breach assigned for want of repairs, the defendant pleaded that the father, when he made the lease, was only tenant for life; and the father being dead, the lease had determined, and, traversing the allegation of reversion in fee in the father, the plea was held good, on demurrer.[1] Upon the same principle it seems that the lessee is not estopped from showing that the lessor was only seized in right of his wife, and that she died before the covenant was broken.[2]

It will readily be seen from these cases that the rule that no estoppel arises where an interest passes simply means that the parties may defeat the lease by showing that it has been terminated by subsequent events; but they can no more attempt to show that the lessor had no interest at the time of the execution of the lease, than in the other case where in point of fact he had no interest at that time. In other words, while a lessee may not be disturbed during the existence of an estate which the lessor possessed at the time the lease was made, on the other hand an additional interest subsequently accruing to the lessor does not enure to the lessee, as it does when the lessor has no title in the outset; and the lessor, upon the acquisition of such additional title, may enter upon and eject the lessee. It is obvious, however, that this can only occur where the future title confers an *additional enlarged* estate; and if it is only another title to the same estate as that possessed when the lease was executed, no entry can be made.

3. *Deeds of Bargain and Sale, Lease and Release, Quitclaim, etc. Doctrine of Rebutter.*

We enter now upon the consideration of a wholly different sort of estoppels; and the old, technical estoppel of the common law, concerning after-acquired estates, passes out of sight for a time. We have already said that the lease is the only kind of deed which has come down to modern times unchanged in this particular. Although the doctrine of rebutter, already referred to, operated to prevent the lessor from disturbing the lessee, by reason of the implied covenant for quiet enjoyment, the lease, as we have seen, has always possessed a further and transcendent power, that of

[1] Brudnell *v.* Roberts, 2 Wils. 143. [2] Blake *v.* Foster, 8 T. R. 487.

actually passing future interests, where the lessor had no title when the lease was made, even against subsequent purchasers from the grantor after title acquired. The feoffment and fine, we have also seen, had a similar double force, one by rebutter, which prevented the feoffor from regaining possession, and the other by estoppel, by which all future-acquired interest actually passed to the feoffee, as in the case of the lease, against all persons claiming subsequently by purchase (and in earlier times by descent also) from the feoffor.

In the cases now to be presented, of conveyances of the grantor's right, title, and interest, this transcendent power of estoppel disappears, and we shall have in the place of it the doctrine of rebutter, which Lord Coke calls a "kind of estoppel,"[1] and the nature of which will fully appear as we proceed.

The reason of the disappearance of this technical estoppel of the old common law is to be sought in the Statute of Uses, the effect of which is to limit the operation of our modern deeds of conveyance to existing, vested interests in the grantor, and to prevent him from conveying any title which he does not possess. He may accomplish the result practically, in a limited way, where the doctrine of rebutter is available to his grantee, but not, with some possible exceptions to be noticed hereafter, by the technical common-law estoppel, so efficient in the feoffment and lease.

In accordance with these principles, it is held that if a party having a vested and a contingent interest in property convey by deed, with warranty, "all his right, title, and interest" therein, the deed only passes his vested interest; and he will not be estopped to claim an after-acquired interest in the property.[2] In the case first cited, one Soley conveyed, by the words quoted, one eighth of an estate devised to him by his grandfather, one half of which devise was a contingent remainder; and it was contended that, though this last-named interest did not pass by the deed, still that when the estate afterwards became vested the deed operated by way of estoppel. The court, however, were of a different opinion.

Chief Justice Shaw said that if the deeds contained the supposed matter of estoppel, the court were not disposed to deny the legal consequences attributed to it. But upon examination of the

[1] Coke Litt. 352 b.

[2] Blanchard *v.* Brooks, 12 Pick. 47; McBridge *v.* Greenwood, 11 Ga. 379, and cases cited in the following pages.

deeds, they did not contain anything which prevented the petitioner from asserting his title to the contingent interest. The indenture which had been most relied upon contained no stipulation or averment that the petitioner's share and property were of any particular proportion. It was manifest that the conveyance was fully satisfied by applying it to the vested interest. No allegation or averment was falsified by a denial of the claim to the land in controversy, because there was no averment of the nature or extent of the right, title, and interest under the grandfather's will. Nor did it make the case different that there was a covenant of warranty; for this was simply equivalent to a warranty of the estate he then held, and was to be confined to the estate then vested.[1]

This subject was considered also in the case of Comstock *v.* Smith,[2] which was a writ of entry. The demandants counted upon their own seizin within thirty years, and a disseizin by the tenant. The tenant pleaded that before the demandants had anything in the premises, one Waters was seized thereof in fee, and that while he was so seized, he (the tenant) bargained with him, by parol, for the purchase of the land. Afterwards, the demandants having disseized Waters unlawfully, and pretending to have a good title, granted the land in fee to the tenant, with warranty; and the tenant continued for a year and upwards to hold under this deed. The tenant then, in order to get back the consideration paid, by deed, "granted, sold, and quitclaimed" to the demandants in fee all his "right, title, claim, and demand in and unto" the premises, covenanting "against the lawful claims and demands of all persons claiming by or under him"; whereupon Waters conveyed the premises by deed to him. The demandants replied that the tenant was estopped by his deed to set up this defence; to which, on oyer of the deed, there was a demurrer, which was sustained.

The judgment was delivered by Mr. Justice Wilde, in an opinion so clear and instructive that we cannot forbear to present a considerable portion of it. "It is a well-settled principle of the common law," he observed, "that if one conveys lands or other real estate, with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee, or those claiming under him, any title subsequently ac-

[1] Brown *v.* Jackson, 3 Wheat. 449. [2] 13 Pick. 116.

quired either by purchase or otherwise. Such new title will enure, by way of estoppel, to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice, as well as the policy of the law. It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it is wise policy to repress litigation and to prevent a circuity of actions, when better or equal justice may be administered in a single suit. By such a grant, with general warranty, nothing passes, nor indeed can possibly pass, excepting the title which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor, to recover the value of the land. The principle of estoppel, therefore, not only prevents multiplicity of suits, but is sure to administer strict and exact justice; whereas if the grantee were driven to his action to recover the value of the land, exact justice might not be obtained, because the land might possibly not be estimated at its just value. If, however, the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then in such case it is obvious that this species of estoppel would not be applicable. And such appears to be the law in regard to the covenant in question, by which the demandants attempt to estop the tenant to set up or plead the title of Waters. The tenant's covenant is a restricted covenant, and is coextensive with the grant or release. He agrees to warrant the title granted or released, and nothing more; that title only he undertook to assert and defend. To extend the covenant further would be to reject or do away the restrictive words of it, and to enlarge it to a general covenant of warranty, against the manifest intention of the parties. . . . . Now if Waters, after the tenant's quitclaim deed, had evicted the demandants, this would have been no breach of the tenant's covenant. Or if the tenant now held under Waters, without having obtained the fee from him, he might pray Waters in aid, and thus defend himself against the title of the demandants; the title of Waters being, as the plea avers, the elder and better title; and this would also be no breach of the tenant's covenant. He did not undertake to convey to the demandants an indefeasible estate, but only his own title, nor did he agree to warrant and defend it against all claims and demands, but only

against those derived from himself; by which he must be understood to refer to existing claims or encumbrances, and not to any title which he might afterwards acquire by purchase or otherwise from a stranger.[1] . . . .

"It was then contended by the demandant's counsel, that, admitting the tenant is not estopped by his covenant of warranty, he is nevertheless estopped by his conveyance to deny that he had any title in the land at the time of the conveyance. This also is a well-established principle of the common law.[2] But the tenant, in his plea, does not deny that he had any title to the land; on the contrary, he avers that, before the time of his conveyance, he was in possession of the land under Waters, that afterwards the demandants disseized Waters, and being seized by disseizin, they conveyed to the tenant all their right and title, with a covenant of warranty similar to the one contained in his reconveyance to them. The demandants, in their turn, would be estopped to aver that they had no title in the land, nor is there any such averment in the pleadings. The tenant, at the time of his reconveyance, might have had a valuable interest in the land by possession and improvements, although Waters had a paramount title. This interest, whatever it was, passed to the demandants by the tenant's deed, and it was all the title he had to convey or was expected to convey. If under these circumstances the demandants could now acquire, without any consideration, another title by estoppel, we should be compelled to admit that estoppels are as odious as they are sometimes said to be. But the doctrine of estoppel aids much in the administration of justice; it becomes odious only when misunderstood and misapplied."

In a subsequent case[3] involving the construction of a similar warranty in a deed of partition, Mr. Chief Justice Shaw said that a covenant that the grantee should hold free from all right, title, interest, or claim of the grantor, could not have greater force than a direct covenant of seizin, which was not broken by the existence of an outstanding, paramount title. It did not estop the plaintiff from showing that, at the time of the partition, a third party held the superior title, which the plaintiff had since acquired and now relied upon. And the doctrine of these cases is well settled.[4]

[1] Ellis *v.* Welch, 6 Mass. 246, 250.

[2] Coke Litt. 45, 47; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Bull, 1 Johns. Cas. 81.

[3] Doane *v.* Willcutt, 5 Gray, 328.

[4] See also Wight *v.* Shaw, 5 Cush. 56; Miller *v.* Ewing, 6 Cush. 34; Smith *v.* Strong, 14 Pick. 128.

It follows that, in cases such as we have been considering, the grantor is not estopped to allege that he has, since the deed was made, acquired a title to the premises by adverse possession.[1] In the case cited, the court said that the whole foundation of the defence rested upon the fact of an after-acquired title by the grantor, or subsequent acts divesting the grantee of his interest in the premises. Full effect was given to the deed, when it was held to vest title in the grantee at its delivery, estopping the grantor from setting up any other title as then held adversely. The principle of rebutter, which had been relied upon, was not available; the foundation of the rule rested upon the fact that the party conveying with warranty had not the title he professed to convey, and was liable on his warranty. But that was not the present case, as a good title had been conveyed.

A similar question arose in Flagg *v.* Mann.[2] It was contended in this case that Flagg and Mann, by accepting a deed of quitclaim from one Richardson, had conclusively admitted that they were tenants in common of the premises. Mann endeavored to dispute the relation; and the court held that he was not estopped to do so.

After stating that the rule of estoppel applied to the law as well as to the facts to be ascertained, Mr. Justice Putnam, for the court, observed: "The material inquiry now is whether Flagg and Mann were joint tenants or tenants in common in this real estate. Has the defendant, Mann, admitted the fact, by accepting the deed from Luther Richardson? The deed is a release and quitclaim, in common form, of all the right, title, and interest of the grantor. It does not affirm that he had any. How then can the grantees be supposed conclusively to admit that he had? The estoppel ought to be certain to every intent, and it should not be alleged by way of inference or argument. If the admission should be coextensive with the grant, it would be but conditional, namely, that if the grantor had any right or interest, which passed by his deed, it vested in the grantors as tenants in common. In other words, they would be bound by the legal effect and operation of the deed. To carry the doctrine of estoppel further would be to assume, without evidence, that the party has admitted the controverted facts.[3] Thus if a man be disseized, and, having a right of entry, takes back an estate from the disseizor by deed-poll, it is a

[1] Stearns *v.* Hendersass, 9 Cush. 497.
[2] 14 Pick. 467.
[3] Shep. Touch. 53; Coke Litt. 363 b.

remitter to the disseizee. He shall be in under his elder and better title. He shall not be estopped from showing and maintaining his elder title, by reason of his having accepted an estate by deed-poll from the disseizor. Again, it is consistent with the deed to plead and prove that nothing passed by it, or that the grantor was not seized at the time. . . . . It is a very common thing for one, in order to avoid litigation, to purchase or extinguish claims to land which the grantee might not think to be valid, and which the grantors would not warrant; and deeds of release and quitclaim of all the right, etc., are used by the parties. It would seem to be unjust, and contrary to the intent of the grantees, to affect their rights by the acceptance of such deeds, beyond the rights and interests which should actually pass by the same."

Though the common quitclaim deed of all the grantor's right, title, and interest conveys only existing interests of the grantor, and therefore will not estop him to claim any subsequently acquired title, the covenant of warranty, without expressly mentioning future interests, may be so expressed as to cover them, and estop the grantor and his privies from claiming them. Jones *v.* King [1] was such a case. The covenant read as follows: "And the said James A. King and William King, for themselves and their heirs, do by these presents covenant to and with the said Thomas C. King that they will forever warrant and defend the title to the said tract of land or lot of ground, to be free from the claim or claims of himself and his heirs, and all other persons claiming by, through, or under him, *and also from the claim or claims of all and every other person or persons whomsoever.*"

Mr. Justice Breese, speaking for the court, said: "We understand it to be a well-settled principle of the common law, that if one conveys lands or other real estate, with a covenant of general warranty against all lawful claims and demands, he cannot be allowed to set up, against his grantor [grantee?] or those claiming under him, any title he himself may subsequently acquire from another, by purchase or otherwise. Such new title will enure, by way of estoppel, to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice, for it is not just that a party should be permitted to hold or recover an estate in violation of his own covenant. And the policy is wise also, for it represses litigation."

[1] 25 Ill. 383.

But the estoppel in these cases is only coextensive with the covenants.[1] The case just cited was a writ of entry. It appeared that the plaintiff had mortgaged the premises to third persons, to secure the payment of a note. Subsequently he conveyed the land to the defendant by warranty deed, subject to the mortgage. He was afterwards sued upon the note, and compelled to pay it on execution; whereupon the mortgagees "released and conveyed" to him all their rights under the mortgage. He now brought suit as assignee. The defendant contended that the plaintiff was estopped by the covenants in his deed to the defendant from purchasing the mortgage, or from acquiring any other outstanding title. The law was well settled, it was said, that a conveyance with warranty, by one who had not a perfect title at the time, operated by estoppel on any subsequently acquired title in favor of the grantee. But the court ruled in favor of the plaintiff.

Shepley, C. J., having remarked that the plaintiff, by being compelled to pay the debt secured by the mortgage, was to be regarded as the assignee of it, proceeded to say that he would be estopped by the covenants in his deed to the defendant to assert any title to which the covenants would be applicable. But the mortgage title was excepted from their operation, and the estoppel was only coextensive with the covenants.

Covenants against the lawful claims and demands of all persons claiming by or under the grantor, in a quitclaim deed, reserving a right of way for a certain purpose, do not estop the grantor from claiming a right to enjoy the way for other purpose than that mentioned, if the way has been laid out and accepted by the public authorities.[2]

A deed of land through which a stream runs, though it contain the usual covenants of warranty, does not estop the grantor from subsequently erecting a dam below the land, and thereby flowing it, under the protection of the Mill Act, in the same manner as if the proprietor had derived his title from some other source.[3]

This doctrine respecting after-acquired estates applies, though the original conveyance was fraudulent and void as against creditors.[4] The case cited was an action of trespass on land; the

[1] Kinnear *v.* Lowell, 34 Maine, 299. And a covenant of warranty does not estop the grantor to claim a way of necessity over the land granted. Brigham v. Smith, 4 Gray, 297.

[2] Flagg *v.* Flagg, 16 Gray, 175.

[3] Dean *v.* Colt, 99 Mass. 486. Per Chapman, C. J.

[4] Gibbs *v.* Thayer, 6 Cush. 30.

plaintiff having conveyed his life interest in trust for the benefit of his wife, by deed of quitclaim, with special warranty against all claims of the grantor or his heirs, or of any other person claiming under him or them. The deed was fraudulent and void, the grantor having been insolvent at the time. Subsequently, having taken the benefit of the insolvency law, he became the purchaser of the assignee's interest in the land, and received a conveyance. The court held that this new title vested in his grantee, and that the action could not be sustained.

Shaw, C. J., said that the covenant in the original deed differed from a general warranty in this, that one was a warranty against any and all paramount title, while the other was against the grantor himself and all persons claiming under him.[1] In the present case the plaintiff was claiming the very same title which he had conveyed with warranty; and it was quite distinguishable from the case when the grantor subsequently purchased another estate.

It was immaterial, he said, whether or not the original conveyance was fraudulent against creditors. If it was not, then the property did not pass to the assignee, and the plaintiff took no title under it; if it was fraudulent, it was by reason of acts done by him, which had given rights to creditors to reclaim the land and hold it, and was an encumbrance against which he had warranted. In this case the purchase of the interest was only an extinguishment of an encumbrance; and by the doctrine of estoppel, this purchase of the outstanding right of creditors enured to the benefit of the plaintiff's grantee.

Whether the execution of a deed works upon a title subsequently acquired by the grantor depends upon a proper construction of the deed. In a recent case in Maine,[2] the plaintiff brought an action for dower. It appeared that her husband had conveyed the premises to one Joab Harriman by a deed to which the plaintiff was not a party. Joab quitclaimed the premises to one under whom the defendant, by sundry mesne conveyances, claimed. This deed of quitclaim contained no covenants of warranty, but closed in these words: "So that neither I, the said Joab Harriman, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will, by any way or means, have, claim, or demand

[1] Newcomb *v.* Presbrey, 8 Met. 406. [2] Harriman *v.* Gray, 49 Maine, 537.

any right or title to the aforesaid premises or their appurtenances, or any part or parcel thereof forever." The defendant claimed that the plaintiff had barred her right to dower by a deed of release made to Joab Harriman *subsequently* to his quitclaim of the premises. But the court ruled that this was no bar.

"As between the demandant and Joab Harriman," Appleton, J., remarked, "she would be estopped. But the release to Joab does not enure to his grantees, and, not enuring by estoppel to their benefit, they cannot set it up as a bar. It has been repeatedly settled that a grantee is not estopped from setting up a subsequent title by language such as is found in the deed of Joab to James Harriman. Nor do the subsequently acquired rights of Joab enure to the use of the grantee." [1]

But the propriety of such a construction has been very properly doubted.[2] A similar covenant in Trull *v.* Eastman[3] was regarded as a covenant real, operating by way of rebutter against the future claims of the grantor, his heirs, and assigns.[4]

If the covenants should become extinguished, they can have no effect, it is plain, as to after-acquired interests. In a recent case,[5] the plaintiff brought ejectment under the following circumstances: The land had been conveyed by A to B, with warranty; B conveyed to C; and C then conveyed it back to the first grantor, A. The plaintiff took a conveyance of the land from B, after he had conveyed to C; and in a suit against A, he now claimed that A's after-acquired title enured to him by reason of the covenants in the first deed by A to B. But the court ruled otherwise. The fact that the plaintiff claimed through divers mesne conveyances from the defendant, who had conveyed with warranty, and the further fact that the defendant had again acquired the title, did not affect the case, and constituted no estoppel against the defendant. The covenants, which passed to C, had been extinguished by the conveyance of the land from C back to the defendant. The plaintiff, having taken a deed from an intermediate grantee, after he had parted with his title, was not in a position to set up an estoppel.

[1] Pike *v.* Galvin, 29 Maine, 183.

[2] Rawle, Covenants, 414, 415, where it is said that Pike *v.* Galvin, and the subsequent case of Loomis *v.* Pingree, 43 Maine, 299, 314, have not elsewhere been followed.

[3] 3 Met. 121.

[4] See also Miller *v.* Ewing, 6 Cush. 34; Jackson *v.* Bradford, 4 Wend. 619.

[5] Goodel *v.* Bennett, 22 Wis. 565. The Bankruptcy Act of 1841 did not extinguish covenants of warranty in a deed. Bush *v.* Cooper, 18 How. 82.

The foregoing are cases of deeds of release and quitclaim of all the grantor's right, title, and interest. A class of cases will now be presented in which the grantor's deed purports to convey a certain specific estate; and here we shall find our modern conveyances — in close analogy to the common-law feoffment — operating to pass future interests without the presence of an express covenant of warranty.[1]

Such a case as this was Van Rensselaer *v.* Kearney, just cited; and the importance of the subject will justify a quotation at length from the opinion of the court, delivered by Mr. Justice Nelson. "On the part of the complainant," said the learned judge, "it is insisted that the conveyance is a deed of bargain, and sale, and quitclaim, without any covenants of title or warranty, and therefore could operate to pass only the estate for life of which the grantor has been seized; that it contains no appropriate words, when taken together, by force of which the subsequently acquired title enured to the benefit of the grantee, or those claiming under him, or that can estop the heirs from denying that he had any greater estate than the tenancy for life; and that the deed purports on its face to grant and convey simply the right, title, and interest which the grantor possessed in the premises at the time, and nothing more; that the only covenant is a covenant against encumbrances, which affords indemnity against any liens or charges upon the estate conveyed, but which cannot be regarded as warranting the title; and that this express covenant takes away all implied ones. . . . .

"By the covenant against encumbrances, the grantor, for himself and his heirs, covenants and assigns to and with the grantee and his heirs and assignees, that the tract of land conveyed, excepting parts previously sold in fee by his ancestor, John Van Rensselaer, and by himself; also lands leased to Robert Van Rensselaer, a lot of woodland to be conveyed by the grantee to H. J. Van Rensselaer, a tract lying in the city of Hudson, and a farm in the possession of Mrs. Moore, — with the exception of these several parcels, the grantor covenants that the tract conveyed is free and clear, and shall be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of these presents,

[1] Van Rensselaer *v.* Kearney, 11 How. 297, 320; Root *v.* Crock, 7 Barr, 380; Call *v.* Coover, 4 Watts & S. 161; Jackson *v.* Carver, 4 Peters, 1, 83 *et seq.*; Crane *v.* Morris, 6 Peters, 598, 612; Bush *v.* Cooper, 18 How. 82.

freely and clearly acquitted and discharged of and from all encumbrances and charges other than leases heretofore given by the said grantor and his ancestors.

"This covenant, it will be seen, excepts out of the indemnity, in express terms, parcels of land previously granted out of the tract, in fee simple, and the title to which was outstanding in third persons; and also the leases which had been given in fee, or for the lives of the lessees, on which rents had been reserved, and which leases were to be transferred to the grantee as rents and profits belonging to the estate, and which he was to enjoy. The draughtsman seems to have supposed that the outstanding titles in fee in these several tracts, and also the leases in fee and for lives previously granted, and above referred to, would have been embraced within the covenant, unless expressly excepted out of it, and that they might be regarded as an encumbrance upon the estate which the deed purported to convey, and consequently a breach of this covenant against encumbrances. This is the natural, if not the necessary, implication from the structure of the covenant; for, otherwise, the exceptions are without meaning.

"And, by parity of reasoning, the implication is equally strong that the covenant embraced, and was intended to embrace and secure to the grantee and his heirs, the whole of the interest and estate in the tract which the deed purports to convey, saving and excepting only the parcels and portions of the title thus encumbered and taken out of it; and hence, if any outstanding title existed, not enumerated and excepted, there would be grounds for alleging a breach of the covenant, and for claiming that the grantee, his heirs or assigns, were entitled to an action to recover indemnity for such diminution of the estate.

"This result would seem almost necessarily to follow from the nature and structure of the covenant, unless we regard it as inserted mainly for the benefit of the grantor, to enable him to make the exceptions. For it is but reasonable to presume that the draughtsman, in making the exceptions, did not stop short in the enumeration of the parts and portions of the estate and title intended to be saved from its operation; or that he omitted any right or interest not intended to pass by the conveyance. And hence the reasonableness of the implication that every part of the estate and interest in the same that the deed purported to convey was intended to be embraced within the covenant not included

within the exception. These several rights and interests had already been excepted out of the granting clause in the deed, and hence the exception in this part of the instrument was not necessary for this purpose. The exception here related exclusively to the covenant of enjoyment of the premises free from all encumbrances, and was intended as a saving from its scope and obligation.

"There is much force, therefore, in the argument that this covenant, from its peculiar phraseology and structure, was intended by the parties as a covenant of the title which the deed purported to convey; and if so, this, of itself, would operate upon the estate subsequently acquired by the grantor, so that it would, as against him and all persons claiming under him, enure to the benefit of the grantee, his heirs and assigns.

"But independently of this view, and of any covenants of title, in the technical sense of the term, in the deed of 1st January, 1795, we are of opinion that the complainant is estopped from denying that John J. Van Rensselaer, the grantor, was seized of an estate in fee simple at the date of that deed, the grounds of which opinion we will now proceed to state.

"The general principle is admitted, that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. . . . . A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for an estate in fee, he must take the precaution to secure himself by the proper covenants of title.

"But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any

covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance. The authorities are very full on this subject." [1]

After reviewing the cases above cited, the learned judge proceeds to say: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it." [2]

[1] The following cases were cited: Goodtitle *v.* Bailey, 2 Cowp. 601; Bensley *v.* Burdon, 2 Sim. & S. 524; S. C. 6 Law J. Ch. 85; Right *v.* Bucknell, 2 Barn. & Ad. 278; Doe d. Marchant *v.* Errington, 8 Scott, 210; Rees *v.* Lloyd, Wightwick, 129; Bowman *v.* Taylor, 2 Ad. & E. 278; Lainson *v.* Tremere, 1 Ad. & E. 792; Stow *v.* Wyse, 7 Conn. 214; Penrose *v.* Griffith, 4 Binn. 231; Denn *v.* Cornell, 3 Johns. Cas. 174; Carver *v.* Jackson, 4 Peters, 1.

[2] The grantor of a deed in fee, with warranty, is estopped to claim a right of homestead in the land, though his deed did not extinguish it. Foss *v.* Strachn, 42 N. H. 40; Strachn *v.* Foss, Ib. 45.

In Missouri it seems that by statute a deed of conveyance of the "fee simple absolute" in land operates like the ancient feoffment upon all after-acquired interests, without express words of warranty. Gibson *v.* Chouteau, 39 Mo. 536, 566. In the case cited, Mr. Justice Holmes, who delivered the opinion of the court, entered into an interesting examination of this subject.

"If this deed," said he, "purports to convey the real estate in fee simple absolute, the after-acquired title passes under the statute, otherwise not. There is no covenant of warranty, and no estoppel by virtue of any kind of expressed warranty. The words 'bargain, sell, release, quit-

Improvements erected by the grantor in possession also enure to the benefit of the grantee.[1] The case cited was an action to

claim, and convey,' are words of release and quitclaim merely. They carry the grantor's interest and estate in the land described, whatever it may be; they do not of themselves purport to do anything more; they do not even raise the *statute covenants* implied in the words 'grant, bargain, and sell,' nor would these transmit a subsequently acquired title. Chauvin *v.* Wagner, 18 Mo. 531. There is no English authority that any other conveyance than a feoffment, fine, or lease, operated by way of estoppel to pass an after-acquired title. Rawle, Covenants, 408. The land is described as being part of the tract located under a New Madrid certificate, to James Y. O'Carroll, or his legal representatives, and as being the same parcel of land conveyed to Pierre Chouteau, Jr., by Robert Wash, as trustee of Joseph Hertzog, by deed recorded. The *habendum* is to Pierre Chouteau, Jr., and his heirs forever. This description would seem to show very clearly that neither party contemplated any other than the inchoate title created by a location under a New Madrid certificate, whatever that might be, and not a fee simple, and that the grantee already had, or claimed to have, that inchoate right by virtue of a deed from Hertzog's trustee, and the grantor releases, quitclaims, and conveys all his interest in the same land and title for the small consideration expressed. It is essentially a quitclaim deed, and nothing more. It makes no positive averment that the grantor is seized or possessed of any particular estate in the premises which the deed undertakes to convey and confirm. Such averments, to create an estoppel, must be positive and certain. . . . . No seizin or possession of any particular estate is affirmed in the deed, either in express terms or by necessary implication, whereby an estoppel might be created. In Van Rensalaer *v.* Kearney, 11 How. 297 [*supra*], the deed expressly affirmed that the grantor had seizin and possession of the estate conveyed, and undertook to convey and confirm the same to the grantee. This is not a deed of that character. It falls within the general principle, which is fully recognized in that case, that a deed of this character, which purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, does not operate to pass or bind an interest not then in existence. In French *v.* Spencer, 21 How. 228, also, the deed expressly affirmed the existence of the particular interest and estate conveyed, and empowered the grantee to make the location, and receive the patent for the land when that interest should be ripened into a complete title. This is clearly not such a deed; nor does it purport to convey a fee simple absolute. To have this effect, under the statute, the deed must undertake to convey an indefeasible title. It must not be a quitclaim deed, merely transferring the grantor's interest, whatever it may be, but a deed which expressly undertakes to convey the land itself, and to convey it in such a manner that the grantee is not to be disturbed in his possession by any one. Bogg *v.* Shoab, 13 Mo. 365. It must contain such positive and certain averments of an absolute title in fee simple as would amount to an express warranty, if contained in a covenant of warranty, that the grantor was seized and possessed of such title to an estate, which he undertook to convey, assure, and confirm to the grantee against all the world, and would therefore create an estoppel by virtue of which the subsequently acquired title might enure to the grantee.

"The statute provision would seem to be the same in principle as the doctrine laid down in these decisions of the Supreme Court of the United States, proceeding upon the idea of an estoppel. It is said in Bogg *v.* Shoab that the statute extends to every deed which was obviously intended

[1] Humphreys *v.* Newman, 51 Maine, 40.

recover possession of certain improvements on property in the hands of a tenant of the owner, by virtue of an attachment and execution against the latter. The owner had, prior to the attachment, mortgaged the property to a third person, and had then erected the improvements in question. The court held that the action could not be maintained; the ground taken being that the owner, by his mortgage, would be estopped, in a contest between him and his grantee, from asserting a title to the property, by the covenants in the deed.

Covenants for quiet enjoyment in themselves are said to be as effectual by way of estoppel as words of conveyance.[1] The point was raised in Long Island Railway Company *v.* Conklin, just cited. Mr. Justice Selden said that he entertained no doubt of the proposition. The grantor in a deed with a covenant for quiet enjoyment would not be allowed to assert a claim to the land in opposition to his covenant.

The doctrine seems to rest upon the same grounds as that concerning the estoppel of a grantor in fee, with warranty to set up an outstanding title against his grantee, namely, that of prevention of circuity of actions. Should the grantor, having acquired a paramount title, attempt to disturb and regain the possession of his grantee, the latter would be entitled to set up the covenant for quiet possession, by way of rebutter; and this, it would seem, would as effectually operate against the grantor as if he had made a direct conveyance of the land.

It is important to notice the distinction between covenants of seizin and against encumbrances, and the covenants for further as-

to convey, and purported to convey, a fee simple absolute, even without a covenant of warranty, but that it did not reach, and ought not to apply to, a deed where the grantor expresly guards against such an inference by inserting a special warranty against himself only, and those claiming under him. The statute requires that the deed should undertake to convey a fee simple absolute.

"A similar statute in Illinois has received the same construction which is given to it in this State. Frink *v.* Darst, 14 Ill. 304. In Cocke *v.* Brogan, 5 Ark. 693, under a like statute, the after-acquired title was held to pass by deeds which conveyed the lots *in fee simple*. This deed can have no greater force than a mere quit-claim which expressly conveys only the right, title, and interest of the grantor, as the case was in Valle *v.* Clemens, 18 Mo. 486. We conclude, therefore, that the after-acquired, inchoate, equitable title to this location did not pass and enure to the grantee under this deed, and that neither the grantee nor these defendants thereby became the legal representatives of O'Carroll, Ruddell, and Wilt, in respect to this land."

[1] Long Island R. Co. *v.* Conklin, 29 N. Y. 572; Goodtitle *v.* Bailey, 2 Cowp. 597.

surance and of warranty. The distinction was presented in the case of Chauvin *v.* Wagner.[1] In this case, Chauvin and wife joined in a conveyance of the wife's land, by a deed which the court held ineffectual to convey her estate by reason of a defective certificate of acknowledgment. This deed contained statutory covenants of seizin, against encumbrances, and for further assurance. The plaintiffs, who were heirs of the grantor, their father, but without assets from him equal to the value of the property conveyed, now brought ejectment to recover it of the defendants, who claimed under the conveyance mentioned. The court held that the plaintiffs were not estopped by the covenants.

Mr. Justice Gamble, who delivered the opinion, said that but one of the statutory covenants in the deed in question ran with the land, which was the covenant for further assurance.[2] "The others," he proceeded to say, "are broken as soon as made, if in the one case there is not an indefeasible seizin, or in the other there is an encumbrance. A right of action exists in either case upon the appropriate covenant, on the execution of the deed; but the damages to be recovered may be enhanced by subsequent events. A recovery of land by title paramount is not the breach of the covenant, but evidence of the extent to which the grantee is damnified by the breach, which existed as soon as the covenant was made.[3] The liability on the covenants, arising as soon as the covenants were made, would bind the heirs of the grantor, having assets by descent, in just the same manner that they would have been bound by a bond for the payment of money, in which he bound his heirs. The covenants are not connected with nor do they run with the land. These covenants do not operate as the ancient covenant of warranty to transmit a subsequently acquired title to the covenantee, nor do they operate as a rebutter against the grantor in respect to their obligation as covenants. In some cases, recitals and admissions contained in deeds are held to estop the grantor and those claiming under him from asserting a title to the land conveyed, when such assertion of title would be contrary to the recital or admission made in the deed.[4] The principle in these and similar cases would warrant the decision that the

[1] 18 Mo. 531.
[2] Collier *v.* Gamble, 10 Mo. 467.
[3] Mosely *v.* Hunter, 15 Mo. 328.
[4] Goodtitle *v.* Bailey, 2 Cowp. 597; Carver *v.* Astor, 4 Peters, 86; Kinsman *v.* Loomis, 11 Ohio, 478; Root *v.* Crock, 7 Barr, 380; Stow *v.* Wyse, 7 Conn. 214. This point is elsewhere considered.

covenants contained in the words 'grant, bargain, and sell,' and which are to be regarded as if written out in the deed, should, as an assertion of present seizin in the grantor, estop him and those claiming under him from asserting a title at the time of making the conveyance. . . . .

"If the plaintiffs are not estopped by the covenants of seizin or against encumbrances, are they affected by the covenant for further assurance? This covenant runs with the land. If Francis D. Chauvin, the ancestor, had acquired a further or better title to the premises, after his conveyance, he would have been compelled specifically to execute the covenant by conveying such title.[1] If he had acquired a title subsequently to his conveyance, and such title had descended to his heirs, they would have been compelled to execute the covenant. The present plaintiffs have never acquired any title to the property from their father. In respect to it, there is no privity between them and their father. It was acquired fourteen years after his death. They are responsible as his heirs, upon his covenants, as far as they have assets by descent from him. And if in the present case it were shown that the assets by descent were equal to the value of the property when they acquired the title, their obligation then as heirs, in respect to the assets descended, might have been held complete to make the assurance.[2] The duty to make an assurance could not devolve on them while the title was in their mother. The covenant provided by the statute, if written in the deed in the form expressed in the act, would simply contain a stipulation 'for further assurance thereof to be made by the bargainor, his heirs and assigns.' The heirs of the grantor, as such, are bound to make assurance, but certainly not until there is something to be done by which the grantee's title can be secured. But nothing could be done by them until the title came to them by descent from their mother, and they could not be held to convey it then, unless they had assets of equal value from their father. No such fact has been shown in the case. If the plaintiffs are to be held bound to make assurance because of equal assets descended from the father, it must be shown by the defendants."[3]

[1] 2 Sugden, Vendors, 541; 2 Ch. Cas. 212; Smith *v.* Baker, 1 Younge & C. Ch. 223.

[2] See Rector *v.* Waugh, 17 Mo. 13; Dean *v.* Doe, 8 Ind. 475; 2 Smith's L. C. 742, 6th Am. ed. For the early common-law rule see Jourdan *v.* Jourdan, 9 Serg. & R. 268.

[3] Sealed articles of agreement for the conveyance of land do not amount to a

The case would not have been different had the deed contained a warranty for the grantor and his heirs;[1] and the rule then is, in both cases, that the heir is not bound to respond to the covenant of his ancestor, unless, *first*, the title was subsequently acquired by the ancestor and fell by descent upon the heir; or unless, *secondly*, assets equal in value to the land at the time of the ancestor's conveyance fell from the grantor to the heir, he having acquired the title from some other source.

The rule in both its parts is in substance the same thing; for if upon a subsequent acquisition of the title by the ancestor and its descent upon the heir he could recover the land from the grantee, he would then have assets with which to answer the covenant. Here again, therefore, the doctrine of rebutter is the foundation of the rule.

The question has arisen as to the effect of a partition between co-devisees upon an inchoate right of dower in one of them, which subsequently became perfect.[2] The facts were these in the case cited: The plaintiff was the widow of Joseph Walker, and the daughter of Josiah Hedges, and also sister of the defendant. During her coverture, her husband had been seized in fee of the premises in which she now claimed dower. The land was conveyed to Hedges, her father, without any release of dower. He died, leaving this and other land to his children; they made partition of the property, and the land in controversy was assigned to the defendant.

Mr. Chief Justice Brinkerhoff, speaking for the court, said: "Is the plaintiff precluded from asserting her claim to dower in a portion of the lands partitioned among her and her co-devisees, by the mutual warranty which the law implies as arising and subsisting, *inter se*, between parties to a partition so long as the privity of estate continues between them? This is a serious question, and one not free from difficulty. That such warranty, as a general rule, exists at common law, is clear from the old books. 'If the purparty of one parcener be evicted by a title paramount, the partition shall be defeated; for the partition *imports a warranty* and condition, in law, that the one shall enter upon the other and enjoy her part in parceny, if she be evicted, as long as the privity

covenant for further assurance, and do not estop the obligor from claiming the land. Anonymous, 1 Hay. 331.

[1] 2 Smith's L. C. 742, 6th Am. ed.; Dean *v.* Doe, 8 Ind. 475.

[2] Walker *v.* Hall, 15 Ohio St. 355.

between them continues.'[1] 'Applying this common-law duty of cotenants to aid each other in protecting what had been a common estate, even after partition made, the law holds it incompatible with their duty towards each other for either to become the demandant in a suit to recover any portion of the land by a paramount title, and thus to place himself in antagonism to his cotenants and their common warrantor.' 'And where partition has been made by law, each partitioner becomes a warrantor to all the others to the extent of his share, so long as the privity of estate continues between them. And inasmuch as a warrantor cannot claim against his own warranty, no tenant after partition made can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been partitioned off to him.'[2]

"That these are the established general rules bearing upon the question under consideration must be admitted; and it is equally clear that when they are applied to the ordinary case of the acquisition by purchase of an independent, adverse, and paramount title by one cotenant, and its assertion by him against another after partition, the operation of these rules is equitable and just. In such case, it is but just that the purchaser of the adverse title should be held to have purchased for the common benefit of all parties to the prior partition, and that his rights under such purchase should be limited to a claim for contribution against his late cotenants, to reimburse him for his expenditure for the common benefit.[3] And, except the case of Woodbridge *v.* Banning,[4] I have not been able to find a case in which any exception to the application of these general rules has been recognized. But the cases in which the doctrine of implied warranty between partitioners has been invoked and applied are few; and all of them present the simple case of a voluntary purchase (after partition made, and before eviction by adverse paramount title) of an adverse and paramount title, and the attempt to assert such title against co-partitioners. But this is not such a case. As in Woodbridge *v.* Banning, *supra*, this is a case in which, by the operation of law and the act of God, there has, subsequent to the partition, ripened

[1] Comyns' Dig. "Parcener" C, 13; Coke, Litt. 173 b and 174 a.

[2] 1 Washburn, Real Prop. 431, 432; Venable *v.* Beauchamp, 3 Dana, 321; Feather *v.* Strohoecker, 3 Penn. 505; Jones *v.* Stanton, 11 Mo. 433.

[3] 4 Kent, Com. 371, notes.

[4] 14 Ohio St. 328.

in favor of the demandant a title which potentially existed in her at the time of the partition, but which was then inchoate and incapable of being asserted. In none of the other cases were the facts analogous to the facts in this; and the question as to whether the common-law doctrines of implied warranty between co-partitioners apply to a case of this kind did not in them arise. Moreover, it seems to me to be not unworthy of notice that the doctrines of implied warranty and consequent estoppel between co-partitioners originated at common law; and, though based on considerations of natural equity, they were long applied only in proceedings at common law by writ of partition. That form of proceeding is now obsolete, and has never had a place in the practice of our courts; it being superseded by proceedings in equity, and under special statutes. And it seems to us that when the principles of the common law are, as here, invoked as guides to proceedings in equity, they ought to be applied only so far as the ends of justice will allow. The warranty under consideration is not a warranty in fact, but a warranty by implication of law only. The law raises the implication for the attainment of justice; and the implication should cease whenever its application will work injustice. To hold Mrs. Walker estopped to claim dower in this case by reason of an implied warranty would be unjust to her; but to award it to her in accordance with the provisions of our statute in respect to improvements made subsequent to alienation by the husband, and decreeing contribution by all the co-partitioners to recompense Mrs. Hall for the loss of her equal proportion of the estate, exclusive of the dower estate of Mrs. Walker, will do justice to all. . . . .

"The case of Woodbridge *v.* Banning, before referred to, was closely analogous to this. There a partition was had between parties as heirs of Anthony Banning, deceased. Subsequently a spoliated will of the common ancestor was established and admitted to probate. And in an action by a devisee under the will, who had been a party to the proceeding in partition, to recover lands which the partition had assigned to other parties, he was held not to be estopped by the proceedings in partition. I think I am not mistaken in saying, however, that in that case the common-law doctrine of implied warranty between co-partitioners escaped the attention of the court. Had it been otherwise, the reasons given for the decision would probably have been modified; but the decision would have been the same."

It must be understood, however, that this doctrine respecting the passing of after-acquired titles by deeds of release and quit-claim is merely personal in its operation, taking effect only between the grantor and grantee and their privies, though it may be otherwise in the cases above presented, where the deed operates like the feoffment. The modern covenant of warranty does not pass the land as to subsequent purchasers without notice. The point will be comprehended by a reference to some of the cases.

In Buckingham *v.* Hanna,[1] it appeared that one Ramey, having no title, executed a mortgage of the land in controversy, with warranty, to the plaintiff, and that afterwards the legal title came to him (Ramey). Subsequently this legal title was divested and vested in one Eveland (who had been owner of a paramount equitable title to the premises), by proceedings in chancery; and the question now arose in the present case whether Eveland took the title unencumbered with the estoppel created by the mortgage to the plaintiff. The court decided the question in the affirmative.[2]

This subject was clearly and forcibly presented by Mr. Justice Gibson in a case before the Supreme Court of Pennsylvania.[3] "The material question," said he, "which arises out of the facts of this case is, whether the conveyance from Judge Wilson to Mr. Chew, and the subsequent conveyance of the legal title by Jeremiah Parker to Judge Wilson, vested a title in Mr. Chew, clear of the encumbrance of the mortgage. . . . .

"What is the nature of the estate which Mr. Chew acquired by the conveyance from Judge Wilson? When that conveyance was executed, the legal title was in Jeremiah Parker, by patents from the commonwealth; and Judge Wilson, having nothing but an equitable title under the articles, could convey nothing more. His deed, therefore, passed to Mr. Chew only an equitable title. But it is said the subsequent conveyance from Jeremiah Parker to Judge Wilson enured to the benefit of Mr. Chew. It did so, but only in equity, and to entitle him to call for a conveyance from Judge Wilson, and not as vesting the title in him of itself, as contended, by estoppel. The facts presented constitute the ordinary case of a conveyance before the grantor has acquired the title; in

[1] 2 Ohio St. 551.

[2] *A fortiori*, where a person without title conveys with warranty, and afterwards receives title as trustee from the rightful owner, for the purpose of transmitting it to a *bona fide* purchaser, the doctrine of estoppel does not defeat the trust estate. Burchard *v.* Hubbard, 11 Ohio, 316.

[3] Chew *v.* Barnet, 11 Serg. & R. 389.

which the conveyance operates as an *agreement* to convey, which, when the title has been subsequently acquired, may be enforced in chancery. But Judge Wilson's act could not prejudice the original vendors, who had a title under the articles to call on him for a mortgage to secure the purchase-money. In equity, whatever ought to be done is considered as actually done; and this maxim is of peculiar force, and the foundation of all equitable practice, in this State, where we have no court of chancery to compel performance of what a party ought in conscience to perform; but it is so only for the purpose of giving parties a common-law remedy on an equitable title, and not of affecting their rights, for in every other respect the distinction between legal and equitable title is as accurately marked and as carefully preserved here as in England. For the purpose of maintaining an ejectment, therefore, Mr. Chew is to be considered as having got in the legal title, but for no other purpose whatever.

"But it is argued that as the deed to Mr. Chew contains a covenant for further assurance, it is to be considered as a covenant to stand seized to the use of the grantee; and, consequently, that the estate was executed in him as soon as the seizin arose out of which the use was to be served. It is true that no particular form of words is essential to a conveyance to uses; but the deed, if it cannot operate in one way, may in another, to effectuate the manifest intention of the grantor. But here there is not a single feature of a covenant to stand seized, the consideration of which is always blood or marriage; nor is there any of a bargain and sale, where the consideration is valuable; for in every conveyance to uses, the covenantor or bargainor must be seized of the legal estate at the time, as the use must arise out of such seizin. In the case of a conveyance before the grantor has acquired the title, the legal estate is not transferred by the Statute of Uses; but the conveyance operates, as I have said, as an agreement, which the grantee is entitled to have executed in chancery, as was decided in Whitfield *v.* Fausset.[1] Mr. Chew, therefore, never acquired anything but Judge Wilson's equitable title; and he held it subject to the countervailing equities to which it was subject in the hands of Judge Wilson himself."

In a case before the Supreme Court of New York,[2] Marcy, J., in delivering the opinion of the court, had occasion to say: "It is

[1] 1 Ves. Sr. 391.

[2] Jackson *v.* Bradford, 4 Wend. 619.

very clear, both from reason and authority, that no title passes by the deed of an heir apparent or presumptive to lands that may afterwards descend to him on the death of his ancestor; yet the heir may be barred by his deed from recovering such lands. Where the deed is by warranty, the warranty will rebut and bar the grantor and his heirs of a future right. This is not because a title ever passes by such a grant, but the principle of avoiding circuity of action interposes and stops the grantor."

The same principle appears in Stokes *v.* Jones.[1] This was an action of ejectment brought under the following circumstances: The land in question having been patented from the government, and but partly paid for, was conveyed by deed of gift, in fraud of creditors, to the plaintiff, with a clause of warranty. Subsequently the land was forfeited to the government by reason of non-payment of the purchase-price. After this, the fraudulent grantor entered and patented the land again, and sold to the defendant, who had no notice of the prior transaction. It was now contended by the plaintiff that this title enured to him, and that the defendant was estopped to deny the claim. The court, however, ruled otherwise.

This case having gone to the Supreme Court a second time,[2] the former decision was reaffirmed. Chilton, C. J., speaking for the court, now said: "We then held that if the deed from John Stokes, Sr., to his son, the plaintiff, was fraudulent, it could not, by virtue of the covenant of warranty contained in it, operate against his creditors or subsequent purchasers, so as to protect his future acquisition of title from them. The voluntary, fraudulent estoppel is as impotent to defeat the just claims of creditors or *bona fide* purchasers for a valuable consideration, as the deed would be had it contained no covenant out of which the estoppel is supposed to arise. A party cannot do by circuity and indirection what the law forbids to be directly done. He cannot avoid the claims of creditors or *bona fide* purchasers by conveying with warranty to defraud them, and afterward acquiring the title. The deed being fraudulent is void as to the defendant, and wholly inoperative, except as between the parties to it."

The question came before the Supreme Court of Georgia in the year 1855. One Pyncheon, having no title, conveyed a tract of land, with warranty, to the plaintiff. Subsequently, having acquired the title, he conveyed the tract to the defendant. The first

[1] 18 Ala. 734; S. C. 21 Ala. 731. [2] 21 Ala. 731, 738.

grantee now brought ejectment against the second. It does not appear from the report of the case that the warranty to the plaintiff extended to future interests in the grantor. The decision was in favor of the defendant on this point.

The court, by Mr. Justice Lumpkin, referring to the discussion of the subject by the American editors of Smith's Leading Cases,[1] said: "The conclusion of the whole matter is, that when lands are sold by any of the modern conveyances, in which the grantor had nothing at the period of executing the deed, the title which he may subsequently acquire does not pass to the grantee by *estoppel*, nor entitle him to recover in ejectment brought against a stranger; that a conveyance, made under such circumstances,[2] does not debar the warrantor or his heirs from recovering under any right or title not vested in the grantor at the time of making the conveyance; . . . . that in no case can this doctrine be made to operate against a purchaser without notice and for valuable consideration; and that if it be held in any of the States of the Union, that where there can be passed to a mere stranger, by way of grant or release, or under the Statute of Uses, a full legal title to land subsequently acquired by the grantor, but not vested in interest in him at the time of the grant, the reason for its transmission must be sought in peculiar custom or particular legislative enactment, and not in the common law nor under the Statute of Uses."

But there is another difficulty in the way of holding that our modern conveyances with warranty operate as conveyances of after-acquired interests against subsequent purchasers, namely, the Statute of Frauds.[3] "Suppose, in this case," said Mr. Justice Banning, in the case cited, "that Baugh, at the time when he made the first of the two deeds, had verbally said to the donee in that deed, 'I have no title to this land, but I expect to get a title to it before long, and I now agree that this deed which I have made to you shall be an estoppel upon me, so as to prevent me, when I do get a title, from saying that the land is mine, and not yours; and I further agree that this estoppel shall be to you a conveyance to you of that title, as soon as I acquire the title.' Is it not most clear that upon this verbal agreement or promise of

[1] 6th Am. ed. pp. 718 *et seq.*

[2] Without warranty as to *future* interests.

[3] Faircloth *v.* Jordan, 18 Ga. 350.

Baugh's no action could be brought 'whereby to charge' Baugh? But if the law be such that a person cannot verbally make an agreement so as to render himself chargeable in a particular way, can it yet be said to be such that it will render him chargeable in that very way, without the existence of so much even as a verbal agreement on his part to be chargeable that way?" [1]

[1] See also Bivins *v.* Vinzant, 15 Ga. 521, in which the court, Banning, J., cite with approval the following passage from the note of the American editors of Smith's Leading Cases: "But it nowhere appears that the effect of a warranty in a conveyance, void for the want of a present estate, was to act as an estoppel and transmit an interest, subsequently acquired; since if such had been its operation, the common-law rule, under which a contingent or future estate could not be passed by a mere deed to a stranger, would have been in all respects nugatory." See 2 Smith's L. C. pp. 727, 728, 6th Am. ed.

The learned judge then says: "It may be added that if a warranty estops the warrantee to say the warrantor had nothing in the land, it equally estops the warrantee from suing the warrantor for a *breach* of the warranty; for, in suing him for such breach, the warrantee has, in effect, to say that he (the warrantor) had nothing in the land when he made the warranty."

He mentions the fact also, that under the registry acts a younger deed, well recorded, takes precedence of an elder deed, not well recorded, instead of working an estoppel against one who purchases from the grantor, after he has acquired a title; and that was the case before the court. See, upon this point, Faircloth *v.* Jordan, 18 Ga. 350, 352, where the court say: "The doctrine that the donee in the younger of two deeds for the same land, made by the same donor, is estopped from insisting that the land was not, by the older deed, conveyed to the donee in that deed, is in direct conflict with much of the law contained in our registry acts. In those acts is to be found this rule, that a younger deed, if duly recorded, is to take precedence of an older deed, if not duly recorded. . . . . This rule, as to the cases that fall within it, is in direct conflict with the aforesaid doctrine of estoppel. And what cases fall within it? Cases in which the donor of the land owned the land at the time when he made the first of the two deeds; how much more, then, in cases in which the donor did not, at that time, own the land, but had come to own it at the time when he made the second deed."

Upon this point Mr. Rawle, in his excellent work on Covenants for Title, p. 430, 3d ed., says: "This result [of passing an after-acquired title as against a subsequent purchaser], if applied to the case of a *bona fide* purchaser without notice, cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, which certainly cannot be considered as tenable, that a person must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance, though without title, to any other person; for if he have, that person will, according to this doctrine, hold the estate as against this purchaser. And if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has thus passed." Referring in a note to White *v.* Patten, 24 Pick. 324, where this argument was urged but disregarded, he says that such an application as was given in that case respecting after-acquired titles and subsequent purchasers, obviously strikes a decisive blow at the protection intended to be afforded by the registry acts. However, he further refers to the fact that

But the rule in this class of cases is otherwise in the case of subsequent purchasers from the grantor, if they are affected with notice of the prior conveyance.[1] In Phelps *v.* Kellogg, which was an action of ejectment, one Bogardus, from whom the plaintiff derived title, having no title, conveyed the land in question with covenants that any future titles which he might acquire should enure to his grantee; and the deed was duly recorded. Subsequently he obtained the title to the land. He died several years afterwards, and a deed of the premises was then made under which the defendant claimed. The court decided in favor of the plaintiff.

The chief justice, referring to but one of the deeds, said that it clearly operated to pass the after-acquired title. It contained an express covenant to this effect, which ran with the land, and bound all persons with notice, deriving title to the premises through the grantor. The deed under which the plaintiff claimed was recorded long before that through which the defendant derived title was executed. The second grantee and those in privity with him, therefore, had notice of the prior deed and its covenants.[2]

The fact that the grantee has an election to sue for a breach of the covenants, after title perfected in the grantor, also indicates that there has been no actual transmission of title; and this subject came before the Supreme Court of Massachusetts in the case of Blanchard *v.* Ellis,[3] an action upon the covenants against encumbrances in a deed of conveyance. It appeared that, at the execution of the deed, the premises were under attachment by one Hill against the party under whom the defendants derived title; that execution was levied upon the land and possession delivered to Hill. The title having become absolutely vested in

the subsequent purchaser in that case had notice of the prior conveyance; so that the case was perhaps correctly decided upon its facts. This point will now be presented in the text. See also Charnley *v.* Hansbury, 13 Penn. St. 16.

[1] Wark *v.* Willard, 13 N. H. 389; Phelps *v.* Kellogg, 15 Ill. 131. This case had been before the court under a different state of facts, by the title of Frink *v.* Darst, and will be found in 14 Ill. 304. See also Gochenour *v.* Mowry, 33 Ill. 331.

[2] See also Great Falls Co. *v.* Worster, 15 N. H. 452; Bivins *v.* Vinzant, 15 Ga. 521, *supra*, p. 359; Way *v.* Arnold, 18 Ga. 181; White *v.* Patten, 24 Pick. 324; Jarvis *v.* Aikens, 25 Vt. 635; Douglass *v.* Scott, 5 Ohio, 195.

[3] 1 Gray, 195. See also Tucker *v.* Clarke, 2 Sandf. Ch. 96; Bingham *v.* Weiderway, 1 Comst. 509; Burton *v.* Reeds, 20 Ind. 87.

Hill, he made a deed of the premises in dispute to the defendants, with covenants of warranty. The defendants now contended that this deed vested the property in the plaintiff by estoppel, so as to preclude them from suing upon the covenants. But the court held that the action was proper.

Mr. Justice Thomas thus stated the opinion of the court: "Supposing it to be well settled, that, if a new title come to the grantor before the eviction of his grantee, it would enure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and the grantor be estopped to deny it, we place the decision of this case on this precise ground, that where a deed of land has been made, with covenants of warranty, and the grantee has been wholly evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount, and compel the grantee to take the same against his will, either in satisfaction of the covenant against encumbrances, or in mitigation of damages for the breach of it. . . . .

"And we are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which in fact estops the grantee, and leaves a right of election[1] in the grantor. The case of Baxter *v.* Bradbury[2] has been strongly pressed upon us as a decision of the very question at issue. If this were so, the question having reference to the title to land in that State, the decision, on that ground, as well as from our respect for that court, would be entitled to the highest consideration, if indeed it were not conclusive. But though there are *dicta* in that case, which state the doctrine very broadly, the case itself differs materially from the one at bar. That was an action for a breach of the covenant of seizin in a deed of warranty, with a mortgage back of the premises, of the same date, to the grantor. The ground taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was, that there never had been any interruption of the possession of the plaintiff. In seeking to deduce from that case a rule for our guidance, this circumstance must be deemed most material; as for a breach of this covenant against encum-

[1] To purchase the paramount title, or not.

[2] 20 Maine, 260.

brances, nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount, or had actually discharged the encumbrance.

"The court, in the case of Baxter *v.* Bradbury, refer to a statement of the result of the authorities by the late Chief Justice Parker, in the case of Somes *v.* Skinner.[1] An examination of the whole opinion in that case would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was, that where a title has enured by estoppel it will avail the grantee, not only against the grantor and his heirs, but strangers who usurp possession without right; and under the facts of the case, and in the view in which it was applied, there is no occasion to reconsider the rule there stated."[2]

But that a specific conveyance in fee, especially if with general warranty, operates, like the feoffment, to pass an estate against subsequent purchasers from the grantor, after title acquired, appears from Cole *v.* Raymond.[3] This was a petition by Cole for partition of certain land, of which he claimed one eighth in fee, under a deed from Benjamin Fletcher to him, made and delivered since the death of Joseph Fletcher, Benjamin's father. This deed purported to convey all the title which accrued to the grantor as heir of his mother; which would have been an eighth interest, had not other circumstances intervened. It appeared that Joseph Fletcher, the father, being possessed of a life estate only in the premises, had conveyed them in fee simple, with covenants of warranty, to persons under whom the respondents claimed. It further appeared that Joseph Fletcher, being thus bound by the covenant of warranty, executed a will, making his son Benjamin residuary devisee and sole executor, and thereupon Benjamin gave bond to pay all his father's debts and legacies, expressly taking upon himself the obligation of such warranty. He had in the mean time acquired a good title in fee, by inheritance from his mother.

Chief Justice Shaw, speaking for the court, said: "It is a well-established rule of law, that although a deed, as a present conveyance, transfers only the title which the grantor then has, yet if it

[1] 3 Pick. 52.

[2] See also Buffum *v.* Hutchinson, 1 Allen, 58. There is, in Bean *v.* Welsh, 17 Ala. 770, 773, a *dictum* to the contrary of the doctrine maintained.

[3] 9 Gray, 217.

is a deed in fee, with warranty, it has a further operation as a covenant real, running with the land, by which the grantor and his heirs are bound to make it good, so that if the grantor has no good and sufficient title to the estate, yet if he or they afterwards acquire a good title, it forthwith enures to the benefit of the grantee, to the same extent as if the grantor and warrantor had had the same good title at the date of the grant and warranty, to operate by way of estoppel, if the action be brought in such form that it may be pleaded by way of estoppel; otherwise by way of rebuttal to the claim of any one bound by such warranty."[1] The result, the chief justice said, was that no estate passed by the deed of Benjamin Fletcher to the petitioner.

The question has been raised whether this doctrine concerning after-acquired titles is applicable in the case of a simple sale of personal property; and although it has been thought to be so applicable in South Carolina,[2] and in New York,[3] the better opinion seems to be the other way.[4] Mr. Baron Parke doubted the doctrine in Bryans *v.* Nix;[5] and the American editors of Smith's Leading Cases, at the point just referred to, add that the law that no interest can pass, either in lands or chattels, which is not vested at the time when it is granted or sold, would be futile if its operation could be evaded by construing the mere grant or sale as an estoppel.

[1] Bates *v.* Norcross, 17 Pick. 14.
[2] Frazer *v.* Hilliard, 2 Strob. 309.
[3] Gardiner *v.* Suydam, 7 N. Y. 357, 363.
See Kimberly *v.* Patchin, 19 N. Y. 330, 339.
[4] 2 Smith's L. C. 742, 6th Am. ed.
[5] 4 Mees. & W. 775, 794.

CHAPTER XIII.

RELEASE OF DOWER.

LASTLY, the rule that a party shall not be permitted to dispute his deed applies to the case of a married woman who relinquishes her right of dower in the lands of her husband.[1]

In the case of Stearns *v.* Swift, the wife had joined with her husband "in token of her relinquishment of dower," when in fact the husband had previously parted with all his interest in the premises to the grantee in the present deed; and this deed contained no words of grant on the part of the wife. The court held that she was estopped to claim dower.

Mr. Justice Wilde said that it was no valid objection to the operation of the deed, on the part of the wife, that her husband had no right or title to the land at the time of its execution. It was not essential that the sale by the husband, and the relinquishment of dower by the wife, should be made by the same deed, or at the same time.[2] Nor was it any objection that the deed of the wife was a mere release, without words of grant; for it operated by way of estoppel, and not by way of grant.

Where the husband conveys his *wife's* land in his own name only, and the wife merely affixes her signature and seal to the deed, in token of her relinquishment of all her right in the bargained premises, the wife is not estopped to claim the land after her husband's death.[3]

Chief Justice Shaw, in the case cited, said, that by law and usage the deed of the husband and wife, conveying the wife's estate, had been deemed sufficient; but it had also been steadily held that, to have this effect, the wife must have joined in the deed; that is, it must appear that both husband and wife were parties to the efficient and operative parts of the instrument of conveyance, and

[1] Stearns *v.* Swift, 8 Pick. 532; Farley *v.* Eller, 29 Ind. 322; Usher *v.* Richardson, 29 Maine, 415. That the wife is not estopped to claim dower without a release of the same, even though she join with the husband in the deed, see Lothrop *v.* Foster, 51 Maine, 367.

[2] Fowler *v.* Shearer, 7 Mass. 14.

[3] Bruce *v.* Wood, 1 Met. 542.

that it was not sufficient that her name was annexed, as expressing her assent to the act of her husband, and without words expressing her formal participation in the granting part of the deed.[1]

The question was considered by the Supreme Court of Ohio, in Woodworth *v.* Paige,[2] whether a wife who releases dower in a deed made without consideration, and to defraud her husband's creditors, was estopped to claim dower against a purchaser, for a valuable consideration, from the grantee. The case did not turn upon this point; but as it is one that is likely to arise at any time, the view of the court is given.

"It would seem obvious," said Thurman, C. J., in delivering judgment, "that if the deed of the husband and wife was executed for a sufficient consideration, and was invalid only by reason of the intent to defraud creditors, she ought to be barred of her dower as against the grantee and his privies. For as between her and them, there is no reason why her release, made for a sufficient consideration, should be avoided. But the case is quite different, I apprehend, where there is no consideration to uphold the deed; and it can only be upheld by the application of the doctrine that, as between fraudulent grantor and grantee, the title of the latter is good. For why, and in what sense, is the deed fraudulent? And why is it that the title of the grantee, who has paid no consideration, is nevertheless good? It is fraudulent simply because it is an attempt to place the property beyond the reach of the husband's creditors; and the title of the grantee is good, except as against the creditors, simply because no court will aid a party to avoid his executed contract made for a fraudulent purpose. But so far as the wife is concerned, she places nothing beyond the reach of the creditors to which they are entitled. It is the husband's estate alone, and not her dower right, that is liable for his debts, and that estate he can convey without her joining in the deed. Her execution of the deed adds nothing to its efficacy so far as his estate is concerned; it simply releases her dower, which the creditors have no right to touch. How, then, can she be said to be a fraudulent grantor? Whom does she defraud, either by the deed or by avoiding it so far as to claim dower?

[1] Lithgow *v.* Kavenagh, 9 Mass. 161; Powell *v.* Monson & M. Co., 3 Mason, 347; Lufkin *v.* Curtis, 13 Mass. 223; Raymond *v.* Holden, 2 Cush. 264.

[2] 5 Ohio St. 70.

Not the creditors, for they had no right to her dower. Not the grantee, for he paid no consideration for the conveyance. Not a purchaser with notice from the grantee, for such purchaser is in no better condition than the grantee himself. How, then, can it properly be said that the deed is her executed, fraudulent contract or conveyance, against which she ought not to be relieved, when its execution does not, and cannot, defraud anybody?"

PART III.

ESTOPPEL BY MATTER IN PAIS;

ALSO

PLEADING, PRACTICE, AND EVIDENCE

FOR THE THREE DIVISIONS OF ESTOPPEL.

12 Am Law Reg. 313

CHAPTER XIV.

IN GENERAL.

We have now reached the extensive division of our subject, termed estoppel by matter *in pais*, otherwise denominated estoppel in fact, and equitable estoppel. And it is so named in distinction from the other classes of estoppel, because the preclusion arises from matter of fact, evidenced neither by record of adjudication nor by deed.

An estoppel by matter *in pais* may be defined as an indisputable admission, arising from the circumstance that the party claiming the benefit of it has, in good faith on his part, been induced, by the voluntary intelligent action of the party against whom it is alleged, to change his position. And the parties may have been *equally innocent* in effecting this change of position, or they may *not* have been *equally innocent*.

The words in italics will indicate the general division of the subject. Estoppel in the first case, in its ordinary aspect, flows from a contract which has been executed on the part of the one claiming the estoppel; in the second case, it flows from an external representation or concealment by the party estopped. In the first case, it precludes the party from denying the truth of a particular fact stated either expressly or by implication in the contract itself; in the second case, it precludes the party from denying the truth of the external fact. And in either case the estoppel has reference to a *representation* express or implied.

We shall find, as we proceed with this subject, especially in considering the first branch of it, a very marked resemblance, in some particulars, to the preceding subject of Estoppel by Deed; while in other particulars the contrast will be equally strong, both with that and the subject of Part I. We shall notice the essential feature of a change of position, to which the party estopped has contributed; while, on the other hand, we shall find a different set of rules in relation to parties under disability, from any that have

heretofore appeared. We shall observe, also, the appearance of the additional fact, in Estoppel by Conduct, of misrepresentation or concealment, by which that branch is marked and separated from the rest.

Before proceeding, however, to the consideration of these branches of the subject, it is proper to take a glance at the estoppel *in pais* of the early common law. Lord Coke names the following instances in which the doctrine arose: By livery, by entry, by acceptance of rent, by partition, and by the acceptance of an estate.[1] These acts *in pais* possessed the same conclusive character as the estoppel by record or by deed. The feoffment itself, at this time, was an act *in pais*, and possessed a higher effect as an estoppel than the deed which was employed to perpetuate its existence, or to transfer a reversion in the same land when held by a tenant of the feoffor.[2] But this form of conveyance was terminated by the Statute of Frauds. The estoppel arising in cases of partition has already been considered;[3] estoppel by livery and by entry have become obsolete, at least in America; while, aside from the case of partition, only one of the instances mentioned by Coke, estoppel by acceptance of rent, prevails at the present day. And of this it is important to remark, that its character is widely different from what it was in the time of Coke. The only rule of estoppel known at this early period of the law, as has been pointed out by an accomplished writer (in a learned article, to which we are much indebted, upon the Estoppel of a Tenant to deny his Landlord's Title[4]), was that by deed. The estoppel by the acceptance of rent, as known to Lord Coke, occurred where the landlord accepted rent from a tenant, who held over after the expiration of a lease by deed.[5] Such an estoppel depended upon the prior existence of a deed; while at the present day it is immaterial how the tenure arose, as will abundantly appear.

It will thus be seen that the estoppel *in pais* of the present day has grown up almost entirely since the time of Lord Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times. By analogy to the rule that a tenant shall not dispute the title of his landlord (and even

[1] Inst. 352 a.

[2] 2 Smith's L. C. 742, 6th Am. ed.

[3] *Ante*, pp. 352, 353.

[4] 5 American Law Review, p. 1 (October, 1871). Understood to have been written by Mr. Joseph Willard, of the Boston bar.

[5] 2 Black. Com. 209; 3 Ib. 175.

this rule did not prevail in Coke's day;[1] the only estoppel of a tenant being by, and by virtue of, a deed, as we shall see), a somewhat similar estoppel has been introduced in the case of bailment, which forbids a bailee, in general terms, to dispute his bailor's title; and other cases of a similar character have arisen. But the most important addition to this branch of the law has been the class of estoppels by conduct. And at the present day no subject is more constantly before the courts than this.

We now proceed to notice the Estoppel upon Persons holding Relations of Duty to Others, which will include the cases of tenants, bailees, and the like.

[1] Moffat *v.* Strong, 9 Bosw. 57, 65, per Woodruff, J.; Duke *v.* Ashby, 7 Hurl. & N. 600, 602. Pollock, C. B.

CHAPTER XV.

ESTOPPEL UPON PERSONS HOLDING RELATIONS OF TRUST TO OTHERS.

We shall first consider the most important division of this chapter.

1. *Estoppel of Tenant to deny Landlord's Title.*[1]

We have already alluded to the fact that the estoppel now presented is one of modern origin.[2] In the time of Lord Coke the only way in which a tenant could be estopped to deny the title of his landlord was by the acceptance of a sealed lease. That this estoppel took its rise from the seal, and differed in origin from the modern estoppel, is evident from the fact, that, in the case of a lease by deed-poll, the estoppel was confined to the party sealing; while it is quite certain that at the present time it is immaterial to the existence of the estoppel whether the lease be by deed-poll or by indenture, or even whether there be any written lease at all. And again the estoppel terminated with the expiration of the lease; while at the present day the estoppel continues until the surrender of possession.

Moreover, even though there was a lease by indenture, no estoppel arose against the tenant, except in actions of which the demise was the gist, such as covenant, or in the avowry in replevin, and similar cases. It arose only upon the indenture, and then only when the indenture was specially pleaded or replied to the plea of *nil habuit in tenementis.*[3] The estoppel could not, therefore, arise in debt for rent; for the indenture could not be the foundation of such an action. "How narrow and technical the distinction," says the writer in the American Law Review, already referred to, "established by this rule was, will appear on referring to the ancient precedents of debt for rent. In Curson *v.* Faunt,[4] the declaration avers a demise, setting out specifically the date, term, premises, and

[1] The estoppel upon the landlord has already been presented, under Estates by Estoppel. *Ante*, pp. 327–334.

[2] *Ante*, p. 370. See also the article already cited from the 5th Am. Law Rev. Without continually citing this article, we shall draw from it considerably in the opening pages of this chapter; and we recommend a careful reading of it.

[3] Palmer *v.* Ekins, 2 Ld. Raym. 1550; Veale *v.* Warner, 1 Wms. Saund. 325, n. 4; Syllivan *v.* Stradling, 2 Wils. 208.

[4] 1 Lilly, Ent. 168 (1698).

rate of rent; yet *nil habuit*, etc., was pleaded, and issue was joined thereon. In Offley *v.* Ormes,[1] the indenture is set out in full; yet *nil habuit*, etc., was a good plea. . . . . Indeed, the entire distinction between the pleading when estoppel would, and when it would not, arise, seems to have been found in the technical averment of the breach; that in debt concluding that such an amount had accrued and was due, etc.; and that in covenant, that the covenant recited had been broken, etc."

It is quite clear, then, that the tenant's estoppel of the present day is not the same as that of the early common law. It seems conclusive, also, against the idea that the modern estoppel originated in the feudal tenures,[2] that the feudal system contemplated no less an estate than a freehold; and the extremely flexible and varied character of the doctrine prevailing at present is in strong contrast to the narrow technical rules of the feudal tenures.

The modern origin of the present estoppel is confirmed by the cases. In the familiar case of Doe d. Knight *v.* Smythe,[3]—an action of ejectment,—Dampier, J., said: "It has been ruled often, that neither the tenant, nor any one claiming under him, can dispute the landlord's title. This, I believe, has been the rule for the last *twenty-five years*, and, I remember, was so laid down by Buller, J., on the Western circuit." The case referred to was perhaps Doe d. Bristow *v.* Pegge,[4] decided in 1785, in which Buller, J., said: "An objection has been taken at the bar, that the plaintiff in ejectment must recover by the strength of his own title. The old cases certainly say so; but for the last forty or fifty years constant exceptions to this rule have been admitted. One case, which is received as clear law, is that of a tenant who cannot set up the title of the mortgagee against the mortgagor, because he holds under the mortgagor, and has admitted the title. There was a case before me at Guildhall, and I believe another upon the Oxford circuit, of the same nature, where a lessee for years had got possession of some mortgage deeds, and endeavored to set up that title against the mortgagor; but though this showed that the plaintiff had no right to recover against the mortgagee, yet I permitted him to do so in that instance, and the decision was acquiesced under." It seems, then, that the origin of the rule in ejectment cannot be traced further back than to the middle of the last century; and the writer in the Review, after mentioning this fact, states that in actions

[1] Ib. 179.
[2] 1 Washburn, Real Prop. 356.
[3] 4 Maule & S. 347 (1816).
[4] Reported in note, 1 T. R. 758.

for use and occupation the rule was held a quarter of a century earlier.

It is also shown by the same writer that the doctrine did not originate from the statute passed in 1738, for the relief of landlords,[1] as was supposed by Mr. Justice Woodruff in Moffatt *v.* Strong.[2] And this appears from the fact that in Lewis *v.* Willis,[3] tried in 1752, the case of Prichard *v.* Houlditch[4] was referred to, to sustain a demurrer to a plea of *nil habuit in tenementis*, in *indebitatus assumpsit* for use and occupation,—a case tried *twelve years prior* to the passage of the act. In Gibson *v.* Kirk,[5] Lord Denman says that *assumpsit* for use and occupation was simply *protected* by the statute from being defeated by proof of a certain rent under a parol demise or agreement not under seal, and that before the statute actions of *assumpsit* for the occupation of land had been frequently held maintainable.[6] The fact is also mentioned, that *debt* for use and occupation antedated the statute.

The conclusion, therefore, is that the origin and character of the modern estoppel of the tenant is to be found in this ancient action of *assumpsit* for use and occupation. In this form of action what was sought to be recovered was, not technically rent, but compensation from day to day for actual enjoyment. But to the maintenance of the action the relation of landlord and tenant must be established; and when established, the modern estoppel *in pais* arises. *Enjoyment by permission* is the foundation of the action, and is, therefore, the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord.

[1] It was enacted by § 14 of this statute, that, "to obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant, in an action on the case [*assumpsit*] for the use and occupation of what was so held and enjoyed; and if, in evidence, on the trial of such action, any parol demise or agreement, not being by deed, wheron a certain rent was reserved, shall appear, the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered." And by § 22, "It shall be lawful for all defendants in replevin to avow and make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the term wherein the rent distrained for incurred, which rent has been and still remains due, ... without setting forth further the grant, terms, demise, or title of the landlord."

[2] 9 Bosw. 57, 65.

[3] 1 Wils. 314.

[4] Hil. T. 13 Geo. 1 (1727).

[5] Q. B. 840, 855.

[6] See also Churchward *v.* Ford, 2 Hurl. & N. 446; Curtis *v.* Spitty, 1 Bing. N. C. 15; Beverly *v.* Lincoln Gaslight Co., 6 Ad. & E. 839, note; Egler *v.* Marsden, 5 Taunt. 25.

If we have succeeded in bringing out clearly the real origin of the modern tenant's estoppel, we shall be prepared to proceed to an examination of the cases. Let it, then, be borne in mind that two conditions are essential to the existence of the estoppel: *first*, possession; *secondly*, permission: and that when these conditions are present the estoppel arises.[1]

It will now be an easy matter to dispose of some of the cases. In Davis *v.* Tyler,[2] the plaintiff brought replevin for taking his goods. The defendant avowed the taking as a distress for rent due. The plaintiff pleaded to the avowry that the land was not the defendant's; to which the defendant replied, by way of estoppel, that the plaintiff had accepted from the defendant a *written* lease for the premises, signed by both parties, and that the plaintiff occupied the premises under the lease. There was a demurrer to the replication, on the ground that a *sealed* lease had not been alleged; and the demurrer was sustained. The court said that no instrument in writing, not under seal, could be pleaded as an estoppel; and that the defendant, therefore, should not have replied the unsealed lease by way of estoppel, but should have taken issue upon the allegation that the premises were not his freehold.

The infirmity of this case readily appears. The court proceed upon the assumption that the seal is the foundation of the tenant's estoppel, evidently having in mind the estoppel of the early common law. And the same remark is applicable to Davis *v.* Shoemaker,[3] and to all that class of cases. It is worthy of notice, however, that the case just cited was an action of debt for rent; and it was for a long time supposed in England that in this action *nil habuit* was a good plea.[4] There is ground for doubt whether such

[1] It has been suggested, and with much soundness apparently, that the estoppel will arise even if there appears no entry or possession by the tenant, if he does not show that he could not get possession. 5 Am. Law Rev. 16; Varnam *v.* Smith, 15 N. Y. 327, 331. In this case Denio, C. J., observed: "If the defendant, in his answer, had confined himself to a denial that the plaintiff, at the time of the demise, had any estate in the premises, the question would be presented whether the ancient rule of the common law, to which I have referred, prevails at this day. There would not be much appearance of justice in holding that where one has taken a written lease of premises, and agreed to pay the rent, but has not thought proper to avail himself of the right he had thus contracted for by going into possession, where he might have done so without hindrance from any one, he can defend against his engagement by showing that there was a defect in the lessor's title, and that he was not really seized of the land."

[2] 18 Johns. 490.

[3] 1 Rawle, 135.

[4] Syllivan *v.* Stradling, 2 Wils. 208; Smith *v.* Scott, 6 Com. B. N. S. 771. *Obiter.*

a doctrine would now be held in England.[1] And it is quite clear that it does not prevail at the present day in America.[2]

In the recent case of Page *v.* Kinsman,[3] the position was taken that the estoppel upon a tenant holding under a lease by indenture did not outlast the term; but that after the expiration of the term the tenant might set up his own title to the premises, without giving back the possession. But the court in this case, misconceiving the true origin of the modern doctrine, rest their decision upon the rule in Coke, that "if a man take a lease for years of his own land, by deed indented, the estoppel doth not continue after the term ended. For by the taking of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines."[4] The seal being the efficient element of estoppel in the early common law, the estoppel was removed when, by the expiration of the term, its power terminated. Now permissive *possession* being the ground of the modern estoppel, it is clear that the estoppel will prevail so long as such possession continues.[5] And the authorities upon this point are numerous.[6]

We proceed now to a more detailed examination of the modern doctrine of the tenant's estoppel, and, as heretofore, by a presentation of the cases.

The rule that the estoppel of a tenant depends upon the existence of a seal having become obsolete, it is plain that the doctrine of mutuality, in the case of competent parties, is fully applicable to the modern relation of landlord and tenant. And as this relation is one of contract, it follows that the same rules concerning the competency of parties prevail here as in the case of estoppels by deed. A lease, like all other contracts, is only binding upon parties *sui juris;* and persons under disability, not being bound by the contract, are not estopped to deny its validity.

But, on the other hand, since a contract made with a person under disability, when not absolutely void, is voidable only by the incom-

[1] See 5 Am. Law Rev. 15.

[2] Moore *v.* Beasley, 3 Ohio, 294; Gray *v.* Johnson, 14 N. H. 414; Varnam *v.* Smith, 15 N. Y. 327.

[3] 43 N. H. 328 (1861). See Carpenter *v.* Thompson, 3 N. H. 204; Gray *v.* Johnson, 14 N. H. 421; Russell *v.* Fabyan, 27 N. H. 537; Accidental Death Ins. Co. *v.* Mackenzie, 5 L. T., N. S. 20; S. C. 10 Com. B., N. S. 870 (Am. ed.).

[4] Coke, Litt. 47 b.

[5] There were other matters involved in the case, however, and the decision was in fact correct, though the above erroneous ground was taken.

[6] See Bailey *v.* Kilburn, 10 Met. 176; Miller *v.* Lang, 99 Mass. 13; Doe d. Bullen *v.* Mills, 2 Ad. & E. 17; Fleming *v.* Gooding, 10 Bing. 549; 5 Am. Law Rev 21, 22, and cases cited.

petent party, and binding upon the other, the latter, in the case of a tenancy, will be estopped to deny the validity of the lease, until its obligatory force is repudiated by the opposite party.[1] In the case first cited, a parol gift of land had been made by a third person to an infant, and the infant's mother had been put in possession under an agreement with the third person to hold the land for her son; and the court held that, though the technical relation of landlord and tenant had not been created, the mother was still estopped, before the surrender of possession, from denying her son's title.

Payment of rent is evidence of permissive occupation, and, when unaccompanied by fraud or mistake, establishes the relation of landlord and tenant.[2] In the case first cited, an action of ejectment, it appeared that, upwards of thirty years before, the defendant had enclosed a piece of waste ground, of which one Trafford was owner. Subsequently the plaintiff bought the land of Trafford, and several years afterwards demanded rent of the defendant, who paid it. Six years later the plaintiff gave notice to quit, with which the defendant refused to comply, claiming that he had a right to the close. The court held the latter estopped by the payment of the rent.

"The payment of rent," said Holroyd, J., "was an acknowledgment that the occupation was by permission. Had the defendant known that the lessor of the plaintiff could not otherwise prove a tenancy, it is probable that he would not have paid the rent; but having paid it, the tenancy is acknowledged."

The doctrine of privity prevails here also, and is illustrated in Doe d. Bullen *v.* Mills.[3] Certain premises were in the possession of a lessee under an indenture from Bullen, the plaintiff. Subsequently the defendant laid claim to the premises, and offered the lessee £20 if he would surrender to him. The offer was accepted, and the defendant took possession. The plaintiff now brought an action of ejectment by reason of a forfeiture caused by the non-payment of rent by the original lessee; and the defendant attempted to prove his own title to the land. The court refused to allow him to do so.

Taunton, J., said that the defendant, having paid £20 for the lease, and then having taken possession, had put himself in the

[1] Russell *v.* Erwin, 38 Ala. 44. See Grant *v.* White, 42 Mo. 285.

[2] Doe d. Jackson *v.* Wilkinson, 3 Barn. & C. 413; Cooper *v.* Blandy, 4 Moore & S. 562; Dunshee *v.* Grundy, 15 Gray, 314; Whalin *v.* White, 25 N. Y. 462.

[3] 2 Ad. & E. 17.

situation of an assignee of that lease, and was as much estopped from disputing the title of the landlord as the immediate lessee.

Patterson, J., said that the act of the defendant by which he was let into possession was either an act of collusion to enable him to dispute the landlord's title, or it was a purchase by him of the lessee's interest; and in either case the defence was inadmissible.[1]

If the tenant sub-let the premises, the sub-lessee cannot dispute the title of the original lessor.[2] In Barwick *v.* Thompson, just cited, the master of a school, holding under the mayor and aldermen of the borough, in their capacity of guardians and governors of the school, demised the school-lands to the defendants, who paid rent to the master. In an ejectment by the mayor and aldermen, the defendants contended that they did not hold under the plaintiffs, but under the master; but that even if they held under them, there was no reason why they should not be permitted to inquire into the validity of their title, since all the evidence of title had been given by the master, and that in this respect the case differed from the ordinary one where a tenant was not permitted to impeach his landlord's title.

But the court were of opinion that, as the defendants held under the master, who had been appointed by the mayor and aldermen, they ought not to dispute the title of the latter, and that it was immaterial whether the defendants held immediately under the mayor and aldermen, or under the master who claimed under them.

The doctrine concerning new tenancy was applied in a recent case in the English Common Pleas.[3] The action was ejectment under the following circumstances. The plaintiffs let land to one Budd, who continued to hold over and pay rent for several years after the expiration of the plaintiffs' title, which occurred in 1859. In 1863 Budd sub-let the premises to the defendant, who paid rent to him. In 1864 the plaintiffs gave notice to Budd to quit, which he did. There was no evidence that the defendant had paid rent to any one subsequently to that date. Judgment was given for the plaintiff.

Willes, J., said: "It seems to me that the question is whether, if Budd had been the defendant, instead of West, he could have resisted this ejectment, for West came in under Budd; and since

[1] See Doe d. Knight *v.* Smythe, 4 Maule & S. 347.

[2] Barwick *v.* Thompson, 7 T. R. 488.

[3] London & Northwestern R. Co. *v.* West, Law R. 2 C. P. 553 (1867).

no change has taken place in the right of the different parties since his tenancy commenced, he cannot dispute that the rights of Budd have duly vested in him. Would then Budd be able to dispute the plaintiffs' title? If his tenancy had commenced after 1859, when the land is alleged to have vested in the adjoining owner, there is no doubt that he would have been estopped from doing so, since a tenant cannot dispute his landlord's title, except by showing that such title has terminated since the commencement of the tenancy. In this case, the answer is to be found in a conclusion of fact, namely, that as the question is raised by a mere stranger who does not even allege that he has any title himself, we ought to conclude, if necessary, that Budd intended to remain tenant to the plaintiffs after 1859, and that there was, therefore, a new tenancy in law from year to year created, subsequently to the year 1859. He, therefore, could not have disputed the plaintiffs' title, and neither can the defendant."[1]

The main doctrine of this subject, that a tenant cannot, while in possession, set up an outstanding title to overthrow the title of one under whom he holds, is illustrated in Doe d. Ogle *v.* Vickers.[2] This was ejectment for land in Shropshire. The facts were these. In 1824 the defendant executed a mortgage in fee to the plaintiff of the premises in question. Subsequently other parties brought ejectment for two undivided thirds of the premises against the defendant, who remained in possession, claiming by title anterior to the mortgage mentioned. The plaintiffs in that case obtained judgment subject to the award of a barrister, who was to direct what sort of lease should be executed by the successful parties to the defendant. The arbitrator awarded a lease, which was executed, and which had not expired at the commencement of the present action. The defendant, having suffered judgment as to one third, contended that the plaintiffs could not recover the other two undivided thirds, as the defendant held them by a title acquired subsequently to the mortgage, and upon which the mortgage could not operate. But judgment was given for the plaintiff.[3]

In a case in the English Common Pleas,[4] the defendant to an

[1] See also, as to privity, Blake *v.* Sanderson, 1 Gray, 332; Lunsford *v.* Alexander, 4 Dev. & B. 40; Rennie *v.* Robinson, 1 Bing. 147; Doe d. Wheble *v.* Fuller, 1 Tyr. & G. 17.

[2] 4 Ad. & E. 782.

[3] See Doe d. Hurst *v.* Clifton, Ib. 809, 813, holding that the case is not different where the deed is set up by a mere nominal party, for the benefit, in reality, of the mortgagor.

[4] Achorne *v.* Gomme, 2 Bing. 54.

avowry for rent pleaded that "before the lessor (who claimed title under a pretended agreement between him and one T. R.) had anything in the premises, and before the demise by the lessor to the lessee, T. R. mortgaged them in fee to J. C.; that the mortgage being forfeited, notice of the forfeiture being given to the lessee, and the lessee having been required to attorn, and having attorned to the mortgagee, he distrained for the rent, when the lessee paid him to save the goods from being sold." The court held the plea bad.

Best, C. J., having stated that the plea amounted to a plea of *nil habuit in tenementis*, said that it had been urged that what had been done by the plaintiff was equivalent to payment, and that the plea was nothing more than a special plea of *riens in arrear;* "but if so," said he in reply, "it may be equally contended that *non tenuit* is a plea of *riens in arrear*. Now it is quite clear that a party cannot plead indirectly that which he cannot plead directly; he cannot, by adding words, effect that which he would not be permitted to effect if it was stated simply; and the rule which prohibits a tenant from disputing in a court of law the title of his landlord is a wise rule, tending to general convenience, especially when there is another court in which he may insist on any equities which the case may involve. I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that the landlord could not justify a distress. In all of them, however, the right of the landlord to demise has been admitted, and the plea has been, either that his title has since expired, or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent. These cases, therefore, rather confirm than impeach the general rule; but the tenant here broadly disputes the lessor's right to demise."

The chief justice undoubtedly referred, among other cases, to Taylor *v.* Zamira,[1] as to which Park, J., said: "In Taylor *v.* Zamira, the land was expressly subjected to distress by a charge created before the lessor's title commenced. In the present case, unless the tenant had attorned, though the mortgagor might have evicted, he could not have distrained."

If a person make an acknowledgment of a tenancy through mistake or ignorance, he will not be estopped to dispute the lessor's

[1] 6 Taunt. 524.

title.[1] In the case first cited, a tenant filed an interpleader against two sets of persons who claimed to be respectively devisees and co-heirs of his original landlord; and the court granted an injunction to stay proceedings at law by one of the parties for the recovery of rent, on payment into court of the sum due, though it appeared that the plaintiff had acknowledged in writing the title of the party suing at law, and had paid rent to him for nearly two years after the death of the original landlord, it appearing that this had been done in ignorance of the fact that the title was in dispute.

"It appears to me well established," observed Lord Chancellor Cottenham, "by the uniform current of all the cases (for there is not that discrepancy between the cases which was suggested), that the rule of law is, that after the death of the person to whom the occupier became tenant, the tenant may require the person claiming under the original lessor to prove his title under such original lessor; and that although the tenant has paid rent to the person so claiming under the original lessor, he is not precluded from so doing by the payment of rent, and other acts which might under other circumstances amount to an attornment. Several cases were cited. Rogers *v.* Pitcher[2] was one. That was a case of mere mistake as to the title of the party to whom the rent was paid. There was no misrepresentation by the party so obtaining the rent; it was a mere misapprehension, and the payment of rent under such misapprehension was not considered as altering the situation of the tenant. He was permitted to call upon the person claiming his land to prove his title. Fenner *v.* Duplock[3] proceeded entirely upon the tenant's ignorance of the title of the party who claimed the rent. Gregory *v.* Doidge[4] is a still stronger case. There does not appear to have been any misapprehension; the tenant had deliberately acknowledged the party claiming as his landlord, and made an agreement with respect to the rent upon that footing. But this proving to have been done in ignorance of the title of the other party claiming, was held not to bind the tenant. The case of Hopcraft *v.* Keys[5] has no direct application; that decision having proceeded upon this, that the occupier did not hold under the party who claimed the rent, that party having

[1] Jew *v.* Wood, Craig & P. 185; Doe d. Plevin *v.* Brown, 7 Ad. & E. 447; Cornish *v.* Searell, 8 Barn. & C. 471; S. C. 1 Man. & R. 703; Rogers *v.* Pitcher, 6 Taunt. 202; Gravenor *v.* Woodhouse, 1 Bing. 38.

[2] 6 Taunt. 202.

[3] 2 Bing. 10.

[4] 3 Bing. 474.

[5] 9 Bing. 613.

been evicted by a title paramount, and the occupier having commenced a new tenancy under the party who so evicted his prior landlord. The case of Doe d. Plevin *v.* Brown[1] was a case of attornment made by the direction of the person under whom the tenant held. The title was disputed by his assignee; but Lord Denman, in holding that the tenant was at liberty to dispute the title of the person to whom he had attorned, says that it was competent for him 'to explain and render inconclusive acts done under mistake or through misrepresentation'; putting, therefore, mistake and misrepresentation for that purpose upon the same footing.

"So far, I think, it was admitted at the bar that the cases were uniform. But a case was referred to, Hall *v.* Butler,[2] which, it is contended, establishes a different doctrine. Now, I think the doctrine of that case is by no means inconsistent with the former cases, but completely and entirely consistent with them. In that case the tenant took possession and held under a person named Nevitt, who afterwards directed the tenant to pay his rent in future to the defendant, Butler. Another person then claimed by title paramount to Nevitt. Butler, the defendant, was entitled to stand in Nevitt's place; and the tenant, who could not dispute Nevitt's title, was held to be equally precluded from disputing Butler's. The judges put it upon this ground, either that the defendant, Butler, ratified the demise, or that there was a fresh demise by him; and, in either case, the tenant could not dispute Butler's title. Now it will be observed that in either case the tenant was disputing the title of the person from whom he derived his tenancy, and not the title of a party claiming through such person. There is nothing, therefore, at all inconsistent in the doctrine of that case with the doctrine of all the preceding cases."

The case of Fenner *v.* Duplock[3] was replevin for goods distrained for rent. The defendants avowed for a year's rent of a cottage and land held by the plaintiff as tenants to one of the defendants. It appeared that Duplock bought the premises of one Collins, who took them under a will. Duplock leased to the plaintiff, who paid rent until the death of Collins. At this time a third person claimed the premises, alleging that Collins had only a life estate under the will. He demanded rent of the plaintiff, who paid it, and refused to pay longer to Duplock. Subsequently, however, upon distress,

[1] 7 Ad. & E. 447.
[2] 10 Ad. & E. 204
[3] 2 Bing. 10; S. C. 9 Moore, 38.

he paid again to Duplock for some time, when the third person renewed his claim. The plaintiff acquiesced again, and again refused to pay to Duplock, who now made the distress which caused the present replevin.

The jury were induced to believe that Duplock knew that he had only an estate for the life of Collins, and that the plaintiff, though aware of the claim of the third party, had paid the rent to Duplock in ignorance of the precise nature of the claim, and in ignorance that Duplock's estate expired at the death of Collins. A verdict was, therefore, found for the plaintiff; and it was now moved that it should be set aside, on the ground that the payment of rent to Duplock by the plaintiff, after he became aware of the adverse claim, was an acknowledgment of Duplock as landlord, equivalent to a new taking. But the court held otherwise.

Best, C. J., referring to the general principle that the tenant may show that his landlord's title has expired, said: "Yet if he enters on a new tenancy, he shall be bound; but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title. The landlord, before he enters into any new contract, must say openly, 'My former title is at an end; will you, notwithstanding, go on?' The defendant in the present case knew that his title was at an end; was it honest in him to persist in his claim, and to call for rent under such circumstances? There is no ground whatever for saying that any attornment took place. Payment of rent may indeed be evidence of an attornment; but before we can decide whether an attornment has taken place, we must look at the circumstances, and see whether they do or not rebut the presumption of an attornment, and the circumstances of the present case repel any such presumption."

The rule is not different where the possession has been obtained by fraud.[1] The case cited was an ejectment, in which it appeared that the defendant applied to the plaintiff, then in possession of the premises, for the privilege of getting vegetables from the garden; and that, having obtained the keys, he fraudulently took possession and set up a claim to the land. The court refused to hear it.

Mr. Justice Patterson said: "In the case of a person who has become tenant, there is no doubt as to the law. Doe d. Knight *v.* Lady Smythe[2] shows that he must first give up possession to the

[1] Doe d. Johnson *v.* Baytup, 3 Ad. & E. 188; S. C. 4 Nev. & M. 837.

[2] 4 Maule & S. 347.

party by whom he was let in, and then, if he, or any one claiming by him, has a title *aliunde*, that title may be tried by ejectment. It was held in that case, not that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession. If the defendant here has any right, she might in the first instance have brought ejectment, or have entered on Mrs. Johnson and disseized her, and maintained the possession. But she takes neither course. She fraudulently obtains permission to go upon the premises, and then turns upon the lessor of the plaintiff, and insists upon holding the land. The rule as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger, or as a servant."

Mr. Justice Coleridge said that there was no distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admitted that there was a title in the landlord. "Suppose," he proceeded to say, "that under the license an undisturbed possession were enjoyed for some considerable time, and an action were brought for use and occupation, could the licensee dispute the licensor's right of action? The law would imply a tenancy under such circumstances. Then, if there be no distinction between the cases of a licensee and a tenant, do the circumstances here present an irresistible case of license? Here is a party quietly in possession. The defendant comes and asks for the key. If she had intended to make a claim of title, she might have come as a trespasser to disseize, and, having entered, might have stood upon her right. But here that was not done; and under the circumstances of this case, the defendant, before she could dispute the title, was bound to put the lessor of the plaintiff in the situation in which she stood before the leave was granted."

The tenant or his assignee is not estopped to explain the circumstances under which he has made an attornment. In Doe d. Plevin *v.* Brown,[1] an ejectment was brought against the assignees in bankruptcy of John Platt, who had demised to Joseph Platt. Subsequently John, becoming embarrassed, assigned the premises to the plaintiff. He then told Joseph of the assignment, and requested him to give the plaintiffs an acknowledgment; whereupon Joseph gave the plaintiffs a shilling, and agreed in writing with them to

[1] 7 Ad. & E. 447.

surrender possession to them. Soon after this a *fiat* in bankruptcy was issued, and John was declared a bankrupt, the defendants being appointed his assignees. The latter now disputed the validity of the transaction by which the premises were assigned to the plaintiffs. But it was insisted for the plaintiffs, that, as the defendants had come in to defend as landlords of Joseph, they were in no better condition than he; and that he, after the payment of the shilling and signing the memorandum by which he agreed to deliver possession to the plaintiffs, was estopped from disputing their title. But the court ruled otherwise.

Lord Denman, in delivering the judgment, said: "No general rule, when rightly understood, is more important, or more strictly to be observed, than that which precludes the tenant from disputing the title of his landlord; and we may concede that, in the present case, the defendants stood in the same situation as Joseph Platt, and could avail themselves of no defence which was not open to him. But he had not received his possession first from the lessors of the plaintiff, nor was any attempt made to question that title under which he had received possession. Assuming that the one shilling was paid by way of acknowledgment, ... still it was paid, in the first instance, upon the request and under the representations made by John Platt, and the memorandum signed only as a consequence of that payment, and upon the faith of the same representations. If at the very time when John Platt informed Joseph of the assignment of the lessors of the plaintiff he had committed an act of bankruptcy, and that assignment which he represented as valid was in truth void, he was practising a fraud on Joseph; and no case has decided that it would not be open to Joseph to explain under what circumstances he made any attornment or other acknowledgment. Gregory *v.* Doidge[1] is a strong and direct authority to the contrary. There was both the fact of one shilling paid as an acknowledgment of Doidge's title, and an agreement with him, after a statement of the amount of rent, to depasture some of his cattle in part payment of the rent. But this was done on the representation of Doidge's brother, and in ignorance of a defect in his title; and the Court of Common Pleas was clearly of opinion that, under these circumstances, the plaintiff, not having come into possession under Doidge, might show that he was not his landlord. Had even John Platt been the

[1] 3 Bing. 474.

lessor of the plaintiff, it would have been open for Joseph to have shown a cesser of his title before the day of demise; for that would have been consistent with the accepting possession from him. Upon the broad principle, however, that it is always open to a party, not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation, we think this inquiry properly gone into."

The case of Hopcraft *v.* Keys[1] well illustrates the doctrine that there is no estoppel upon a tenant to show that his landlord's title has expired. The action was replevin, to try the validity of a distress for rent. Issue was joined on the plaintiff's plea of *non tenuit*. The facts were these: Hopcraft was let into possession of the house by Hawkins, February 12, 1831, as tenant for a year; and the house being unfinished, Hawkins undertook to finish it by a certain time, and to give Hopcraft the option of a lease at the end of the year. Hawkins had no other title to the premises than an agreement with one Kent, bearing date September 17, 1830, by which Kent agreed to grant him a lease after Hawkins should have finished the houses described in the agreement; reserving to himself an express power of re-entry, and avoiding the agreement if the houses were not completed within six months from the date of the agreement. The houses were not finished within the time, and Kent, on the 2d of April, before any rent was due from Hopcraft to Hawkins, re-entered for the condition broken, and turned out all the tenants, Hopcraft among them. Kent thereupon put a man in possession of the house which had been occupied by Hopcraft. The house was subsequently finished, vacated, and leased again to Hopcraft by Kent, upon a new agreement and for a different rent.

The chief justice, with whom the other judges concurred, said that it was competent for the plaintiff to show that his landlord had a defeasible title only, and that such title had been actually defeated before any rent became due, and that the rule of estoppel could not apply to the case where the tenant had been actually turned out of possession, and kept out a considerable time, and had afterwards entered under a new agreement, made *bona fide*, with another person.

It is well settled that a tenant in possession, even after the expiration of his lease, cannot deny his landlord's title, without

[1] 9 Bing. 613.

either surrendering possession to him, or attorning, or at least giving notice to his landlord that he shall claim under another and a valid title.[1]

In Morse *v.* Goddard, just cited, the plaintiff sued for a month's rent, and the defence was that the tenant had been ousted by persons having a paramount title, before the commencement of the time for which the rent was claimed. The defendant offered to show that persons having a valid title, paramount to that of the defendant and his lessor, the plaintiff, and having an immediate right of entry, and of possession under it, made an actual entry on the premises, and required the defendant to pay rent to them from the time of such entry, or quit the premises. But it was objected that a tenant could not contest his landlord's title, or set up a paramount adverse title in a third person. The court, however, received the evidence.

Chief Justice Shaw, speaking for the court, observed that the general doctrine of estoppel upon a tenant was not inconsistent with another rule, that where there is an eviction or ouster of the lessee, by title paramount, which he cannot resist, it is a good bar to the demand for rent, on the plain ground of equity, that the enjoyment of the estate is the consideration for the covenant to pay rent, and when the lessee is deprived of the benefit he cannot be held to pay the compensation.[2] "It is not enough, therefore," the learned chief justice proceeded to say, "that a third party has a paramount title; but to excuse the payment of rent, the defendant must have been ousted or evicted under that title.[3] But an eviction under a judgment of law is not necessary. An actual entry, by one having a paramount title and present right of entry, is an ouster of the tenant. He cannot lawfully hold against the title of such party. He is not bound to hold unlawfully, and subject himself to an action, and is not, therefore, compellable to resist such entry.[4] So when an execution creditor is put into possession by the sheriff, under the levy of an execution, he has the actual and exclusive possession, and may maintain trespass.[5] There is a recent case which seems to us alike in principle.[6] A mortgagor in possession made a lease for years, reserving rent. Afterwards

[1] Miller *v.* Lang, 99 Mass. 13, per Gray, J.; Hilbourn *v.* Fogg, Ib. 11; Morse *v.* Goddard, 13 Met. 177.

[2] Bacon's Abr. Rent, L.; Cruise's Dig. Tit. 28, c. 3.

[3] Hunt *v.* Cope, 1 Cowp. 242; Pendleton *v.* Dyett, 4 Cowen, 581.

[4] Hamilton *v.* Cutts, 4 Mass. 349.

[5] Gore *v.* Brazier, 3 Mass. 523.

[6] Smith *v.* Shepard, 15 Pick. 147.

the mortgagee, having a paramount title, entered, as he lawfully might, with right to take the rents and profits. In a suit by lessor against lessee for rent, such entry under a paramount title was held to be an ouster, and a good bar to the action." [1]

The instruction to the jury had been that if the defendant, *bona fide*, had yielded possession of the premises to the third persons, to prevent being actually expelled, of which the plaintiff had notice, and if, upon the evidence, the third persons had a good title, paramount to that of the defendant and of the lessor, and the right of immediate possession, then their entry was equivalent to an actual ouster, and was a good and available defence to the action of rent. And this instruction was held right.[2]

The settled doctrine, in this country at least, is in accordance with the above case of Morse *v.* Goddard, that a constructive eviction is sufficient to remove the estoppel of the tenant.[3] A different rule, however, at one time prevailed in the courts of New York. It was even supposed, in some of the cases, that an eviction under legal process was necessary to produce this result;[4] and later, when this position was abandoned, it was still insisted that there must have been an actual entry and expulsion.[5] But this position is not now upheld.[6]

Some doubt has been raised in a recent English case[7] whether this be the law in England; but it has been distinctly so declared in one case,[8] and evidently so considered in others.[9] And it has

[1] But where the third person merely forbade the tenant to pay rent to his lessor, demanding it herself, but without avail, and had even brought a writ of entry which had not been tried, it was held that the tenant could not set up the title of such person, in an action by the landlord to recover possession. Hawes *v.* Shaw, 100 Mass. 187. See also Hardy *v.* Akerly, 57 Barb. 148.

[2] Shaw, C. J., said that it was to be understood that when a tenant thus relied on an ouster *in pais*, without judgment, he had the burden of proving the validity of the elder title, the actual entry under it, and that he acted in good faith, and without collusion with the party entering. See Winstell *v.* Hehl, 6 Bush, 58.

[3] Grist *v.* Hodges, 3 Dev. 198; Ross *v.* Dysart, 33 Penn. St. 452; Simers *v.* Saltus, 3 Denio, 214; Greenvault *v.* Davis, 4 Hill, 643; Whalin *v.* White, 25 N. Y. 462, 465.

[4] Lansing *v.* Van Alstyne, 2 Wend. 563, note; Webb *v.* Alexander, 7 Wend. 281; Greenby *v.* Wilcocks, 2 Johns. 1.

[5] Waldron *v.* McCarty, 3 Johns. 471; Kortz *v.* Carpenter, 5 Johns. 120; Kerr *v.* Shaw, 13 Johns. 236.

[6] Simers *v.* Saltus, *supra*; St. John *v.* Palmer, 5 Hill, 599; Greenvault *v.* Davis, *supra*; Whalin *v.* White, *supra*.

[7] Delaney *v.* Fox, 2 C. B., N. S., 768 (1857). Per Cockburn, C. J.

[8] Poole *v.* Whitt, 15 Mees. & W. 571, 577.

[9] Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307; Hawkes *v.* Orton, 5 Ad. & E. 367; Emery *v.* Barnett, 4 Com. B., N. S., 423.

been said that the law must be regarded as settled in England in this way.[1]

There has been some conflict upon the important question, whether a tenant taking a lease of land of which he was already in possession may deny his lessor's title. It is agreed in all the cases, that if the tenant was induced to take the lease by mistake, fraud, or misrepresentation on the part of the lessor, he may dispute his title.[2] But the conflict arises in cases in which there is no such element. In New York and Kentucky it is held that the estoppel prevails;[3] while in California the contrary doctrine has been held in two recent cases, upon great consideration.[4]

In delivering the opinion of the court in Franklin *v.* Merida, Mr. Justice Sanderson said: "The doctrine [of estoppel] is a harsh one, and is never to be applied except when to allow the truth to be told would consummate a wrong to the one party, or enable the other to secure an unfair advantage. If A, being in possession of land, deliver the possession to B, upon his request and upon his promise to return it, with or without rent, at a specified time, or at the will of A, B cannot be allowed, while still retaining possession, to dispute A's title, because to allow him to do so would be to allow him to work a wrong against A by depriving him of the advantage which his possession afforded him, and with which he would not have parted but for the promise of B that he would hold it for him, and in his place and stead. But the maxim, 'Cessante ratione legis, cessat ipsa lex,' must not be overlooked, — 'Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.' If B is in possession, and takes a lease from A, the latter parts with nothing, and the former has obtained nothing by the transaction. If, however, either has gained anything, it is A. He has gained rent, and in the event of a controversy, a *prima facie* case as against B without proof of title, while B's case is weakened by so much as a *prima facie* case is worth. A may have gained more, for he may have severed an adverse possession, and stayed the running of the Statute of Limitations; for there can be no adverse possession while

[1] 5 Am. Law Rev. 35.

[2] Miller *v.* McBrier, 14 Serg. & R. 382; Swift *v.* Dean, 11 Vt. 323; Shultz *v.* Elliott, 11 Humph. 183; Franklin *v.* Merida, 35 Cal. 558, 571.

[3] Jackson *v.* Ayres, 14 Johns. 224; McConnell *v.* Bowdry, 4 T. B. Mon. 392; Patterson *v.* Hansel, 4 Bush, 654.

[4] Tewksbury *v.* Magraff, 33 Cal. 237 (1867); Franklin *v.* Merida, *supra* (1868). Sawyer, C. J., dissented in both cases.

the lease subsists, or until there has been an open repudiation and disavowal of the tenancy by B. A's right to sue for possession is postponed, it is true. In that respect only is his relation to the property affected by the transaction, except beneficially; but for the possession which he might have obtained, the rent promised by B is a legal equivalent. Having thus obtained no advantage over A by the transaction, why should B be estopped from showing precisely what he would have been permitted to show had the transaction never occurred? If A is thus in no worse plight than he was before the transaction, upon what principle in law or ethics can the truth be kept back? Upon what rational ground, either in an action upon the lease for rent, or in an action for the possession, should B be denied the right to show that A had no title, and, therefore, no right to the rent or possession. If B has promised to pay rent, or hold the possession for it, he having no title, where is the consideration for B's promise? Suppose the title is in C; B is then legally bound to pay the value of the use and occupation to C, and surrender to C, notwithstanding the lease from A. If, then, he cannot be allowed to dispute A's title, B can be legally made to pay rent to A, and the value of the use and occupation to C. The doctrine of estoppel between landlord and tenant was never designed to work such a result. It was designed merely as a shield for the protection of the landlord, and not as a sword for the destruction of the tenant."

Further on the learned judge proceeds to say that the precise question is, "whether the bare possession of the tenant, at the time the lease is given and taken, is sufficient to take the case out of the operation of the general rule that the tenant cannot dispute the landlord's title, or whether there must be, in addition to the possession of the tenant, some force, fraud, misrepresentation, or mistake induced by the landlord, beyond what is implied in the transaction itself,[1] by which the tenant was influenced to take the lease. The latter view is maintained by counsel, while in Tewksbury *v.* Magraff we declared the former.

"Counsel does not claim that force, fraud, misrepresentation, etc., are not of themselves, irrespective of the fact of possession, sufficient to take the case out of the operation of the general rule. If they are, and of that there can be no doubt, it follows that, on the score of principle, the fact of possession is a false quantity for

[1] That is, the giving and receiving a title not the landlord's.

all the purposes of the question. If the bare possession of the tenant is not enough, and force, fraud, misrepresentation, and the like, are of themselves enough to take the case out of the operation of the general rule, obviously the fact of possession is then wholly immaterial, and constitutes no quantity in the problem to be solved. So, on the score of logic, the argument, if it proves anything, proves too much.

"But it is said that Tewksbury *v.* Magraff goes further than any previous case has gone, and that it cannot be maintained upon authority. That there are cases where it has been held that the bare possession of the tenant at the letting does not relieve him from the estoppel, cannot be denied; nor can it be denied, as we shall presently see, that there are cases the other way. The latter, in our judgment, accord with the reason upon which, as we have seen, the estoppel is founded, but the former do not.

"Of the cases which declare a doctrine contrary to the one entertained by us, there are two classes: first, those in which the facts presented the dry question whether the bare possession of the tenant at the letting relieves him from the estoppel; and second, those in which the dry question was not presented by the facts, and the doctrine was announced merely in the course of discussion. The latter are entitled to no consideration as precedents. For the former only can that distinction be claimed. Of them only two have been called to our attention in which the decision turned upon a bare possession by the tenant at the time of the letting,— McConnell *v.* Bowdry's Heirs and Widow,[1] and Jackson *v.* Ayres.[2] In neither case was the reason upon which the estoppel is founded considered or applied. In each the court merely stated what it considered to be the rule; and the latter case, as the report shows, was submitted without argument. Such cases are far from satisfactory, and are not to be received as conclusive of the law. The remaining cases upon which the respondent relies are entirely consistent with the rule announced by us in Tewksbury *v.* Magraff.

"In Hall *v.* Butler,[3] N., having no title to certain premises, let them by parol and received rent. Afterwards another claimant, B., demanded the rent; and N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B., who was now the landlord, and that the rent was

[1] 4 T. B. Mon. 392.
[2] 14 Johns. 224.
[3] 10 Ad. & E. 204.

thenceforth to be paid to B. The tenant acquiesced, and, when B. demanded the next quarter's rent, paid part of it on account. Lord Chief Justice Denman, Mr. Justice Littledale, and Mr. Justice Patterson, all delivered opinions to the effect that the tenant was estopped, but put their conclusions upon somewhat different grounds. Lord Denman put his judgment upon two grounds; first, that N. was to be considered as the agent of B., and therefore that the entry of the tenant was under B.'s title; and, second, that there was a fresh demise by B., unaccompanied by any misrepresentation as to the title of B. In this latter ground, Lord Denman implied merely that the possession of the tenant, of itself, made no difference in the result. Mr. Justice Patterson, however, recognized the contrary doctrine. He said: "There is a distinction between disputing the title of one who has actually let the party into possession, and of one who afterwards claims to be entitled. In the latter case, the tenant may generally dispute it, by showing title in another." He then adds: "I am not sure that it [the transaction between N. and the tenant] may not be as an original taking from B. himself; for N. treats himself as the agent of B., who adopts the demise." This common ground must be considered as the ground upon which the judgment in the case rests, in which view the case is entirely consistent with the rule in this court.

"Ingraham *v.* Baldwin[1] was a case where the tenant entered under the lease, and the landlord afterward conveyed to the plaintiff, to whom the tenant then attorned, and it was held that the tenant could not dispute the title of the plaintiff. Instead of being at war with Tewksbury *v.* Magraff, this case is entirely consistent with it. We there held that in such a case the tenant could dispute only the derivative title. By so doing he does not deny the title of his landlord, but merely that the plaintiff has become the grantee of his landlord. But beyond that he cannot go; for to do so would be to dispute the title under which he entered.

"The other cases are where extrinsic misrepresentation and the like, on the part of the landlord, accompanied the possession of the tenant at the letting, when it was held that the tenant was not estopped.[2] Of them it is sufficient to say that they are not

[1] 9 N. Y. 45.

[2] Hall *v.* Benner, 1 Penn. 402; Hamilton *v.* Marsden, 6 Binn. 45; Brown *v.* Dysinger, 1 Rawle, 408; Miller *v.* McBrier, 14 Serg. & R. 382; Swift *v.* Dean, 11 Vt. 323; Shultz *v.* Elliott, 11 Humph. 183.

authority upon the question in hand. They establish the proposition that a tenant who was in possession at the time he took his lease, and who was induced to take it by unfair means, may dispute his landlord's title, — a proposition which no one disputes. Because they do that, however, they cannot be taken as negatively establishing the proposition that the tenant cannot dispute the title of his landlord solely upon the ground that he was in possession when he took the lease. . . . .

"We now come to those cases by which, as we consider, the rule in Tewksbury *v.* Magraff is sustained. Chettle *v.* Pound [1] was action of debt for rent. Upon *nil debet* pleaded, the plaintiff gave in evidence a note in writing, by which the defendant had agreed to hold for one year, rendering rent of fifteen pounds sterling. The plaintiff was grantee of a reversion expectant upon an estate for life, and the tenant for life was dead at the time the note was given. The grant to the plaintiff was made forty years before, and he had never been in possession. The defendant offered to prove a grant of the reversion prior to that of the plaintiff, and thus show that the plaintiff had no title at the time the note in writing was given; and it was ruled by Mr. Chief Justice Holt that the defendant could do so, because the plaintiff had never been in possession; but if he had, that then the defendant could not have given the prior grant in evidence without having been evicted. There was no pretence that the note in writing, by which the defendant had agreed to hold for the plaintiff, had been obtained by any unfair means, not implied in the transaction itself, and the case turned wholly upon the bare fact that the defendant did not receive the possession from the plaintiff.

"Rogers *v.* Pitcher [2] was replevin for property distrained for rent. The plaintiff was in possession, and the defendant obtained a judgment and *elegit* against a moiety of the premises, and thereafter the plaintiff had paid rent for such moiety. The defendant, on whom the issue of tenancy lay, proved the payment of rent and rested. The plaintiff proposed to answer it by showing that the defendant was not, at the time the rent was paid, or then, legally entitled to the rent; to which the defendant objected upon the ground that by the payment of the rent the plaintiff had acknowledged the defendant as her landlord, and was now estopped from contesting his title. It was held that the plaintiff was not estopped.

[1] 1 Ld. Raym. 746. [2] 6 Taunt. 202.

There was no pretence of any extrinsic misrepresentation, or the like, on the part of the defendant, by which the plaintiff had been induced to pay rent. There was, therefore, no ground for the rule adopted, except the possession of the plaintiff before and at the time of the attornment; although there is, as we admit, language in the opinions of the judges which, unless read by the light of the facts of the case, might lead to the inference that the case included express misrepresentation or the like. But it is well understood that, on the score of authority, it is the facts and the judgment thereon which constitute the case, and not the mere language of the court in announcing its conclusions.

"Gravenor *v.* Woodhouse[1] was also an action of replevin for property distrained for rent. At the trial the defendant put in a written attornment, by which the plaintiff, being in possession at the time, as the attornment upon its face showed, agreed to hold for one year, and from year to year, at a yearly rent of seventy pounds sterling, without prejudice to any right or claim of his own to the premises. It was objected, on the part of the plaintiff, that the language of the avowries was not sustained by the attornment, and evidence was offered of a feoffment made to the plaintiff by a person under whom the defendants claimed, and of certain letters from that person containing expressions which were said to be adverse to the defendants. The court, however, thought the avowries sustained by the language of the attornment, and rejected the evidence, upon the ground that the plaintiff could not dispute his tenancy, after having made the attornment in question. There was no pretence, so far as the case shows, that the attornment had been obtained by any unfair means, not implied in the transaction, on the part of the defendants. The judgment went against the plaintiff, and there was, therefore, no ground for a new trial, except the fact that the plaintiff was in possession when he attorned. A new trial was, nevertheless, granted; the court holding that the attornment did not estop the plaintiff.

"Cornish *v.* Searell[2] was *assumpsit* for use and occupation. A being tenant under B, and a sequestration having issued out of chancery against B, signed the following instrument: 'I hereby attorn and become the tenant of C, and D, two of the sequestrators named in the writ of sequestration, issued in the said suit in chancery, and to hold the same for such time and on

[1] 1 Bing. 38.

[2] 8 Barn. & C. 471.

such conditions as may be subsequently agreed upon.' It was held, first, that this was an agreement to become tenant, and required a stamp; and, second, that A, not having received possession from C and D, might dispute their title. So far as the statement of facts as given by the reporter shows, there was in this case no suggestion of unfair means not intrinsic, on the part of C and D, by reason of which A was induced to attorn to them. Yet it has been said that it was a case of mistake. This statement has no foundation whatever in the facts of the case, and rests entirely upon a single word found in the opinion of Mr. Justice Bayley, who said: 'As sequestrators, they [the plaintiffs, C and D] have no legal right to receive the rents. It has been said that the defendant, having agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not dispute their title. In Rogers *v.* Pitcher and Gravenor *v.* Woodhouse the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by *mistake* to one who has no title. In the former case, the tenant cannot (except under very special circumstances) dispute the title; in the latter he may.' The claim that the case was one of mistake is founded solely upon the use of the word 'mistake' in the foregoing passage. There was no mistake whatever as to the title of C and D. There could be none; for the instrument which was signed by A showed upon its face that they were only sequestrators, and therefore without legal claim to the rents. It cannot be supposed that a person in possession will knowingly take a lease from a party who has no title to the premises, and it is not, therefore, a forced use of language to speak of it as a 'mistake'; and it is in that sense that we understand Mr. Justice Bayley. But were it otherwise, the incautious use of words by the court cannot override the facts of the case, or limit the force of the judgment. It is very plain that A signed the instrument with his eyes open, knowing all the facts and circumstances, and that it was considered that he was estopped by that act.

"In Jackson *v.* Cuerden,[1] the defendant A, being in possession under B, the supposed proprietor, applied by letter to C as the real owner to purchase, and requested to be considered as a tenant. In ejectment by C against A, it was held that the latter

[1] 2 Johns. Cas. 353.

was not estopped by his letter from showing that his letter was grounded on a mistake, *or that the fee existed in himself or out of the plaintiff*.[1]

"In all cases where a party out of possession seeks a taking and holding under himself by another in possession, from the very nature of the case there must be a representation by him that he is the owner. The bare proposition to lease involves such a representation; and if he be not the owner, the representation is false. If, under such circumstances, a party in possession takes a lease, his act can be accounted for upon no rational theory, except that he was influenced by this express or implied representation. When, therefore, in the opinions of the judges, such expressions are used, their sense is fully satisfied, as we consider, by the intrinsic probability that there was unfair means employed, or there was some mistake by which the tenant was induced to act; and, in our judgment, such intrinsic probability not only justifies, but requires, the courts to look behind the lease, and unearth the truth. As already suggested, the doctrine of estoppel was not designed to secure to any one an advantage over another, but to prevent such a result, and to maintain the *status* which existed at the outset; to protect the landlord in his actual possession against the trickery or sharp practice of the tenant, not to enable him to impose upon the tenant, and thereby to obtain that which before he had not."

The doctrine of the above case seems at first to derive some support from a late English case, in which it was held that, when a person in possession of land under a good title became tenant, by attornment, to another, under an arrangement for an assignment — which had never been perfected — between the original lessor and the party to whom the attornment was made, he would not be required, after the termination of the lease, to give up the possession before he could dispute the lessor's title.[2] Without expressing any opinion as to how the case might have been during the continuation of the lease, Erle, C. J., said that he could find no authority for the doctrine that a person taking a lease of his own land was not entitled, at the expiration of the term, to dispute the title of his lessor.[3] But it would seem to be a sufficient ground

[1] See also Jackson *v.* Spear, 7 Wend. 401.

[2] Accidental Death Ins. Co. *v.* Mackenzie, 10 Com. B., N. S., 870, Am. ed.; S. C. 5 Law T., N. S., 20.

[3] See also Shelton *v.* Carrol, 16 Ala. 148; Agar *v.* Young, Car. & M. 78.

upon which to sustain the case, that the assignment was not perfected.

In a similar case recently before the Supreme Court of Massachusetts,[1] the tenant was held estopped to set up the title of a third person, though it appeared that he was ignorant of her title when he made the attornment, and though she had forbade him to pay rent to the plaintiffs, demanding that it should be paid to herself. It did not appear, however, that he had ever attorned to her, or that he had renounced his tenancy under the plaintiffs.

So, too, in another very recent case[2] in the same State, a defendant in a suit for possession was not allowed to prove that he had been in possession in right of his wife, prior to taking a lease from the plaintiff, and that before the end of the term he had given notice to the plaintiff that he should renounce his title, and claim thenceforth under that of his wife. Nothing was said of fraud or mistake. And a similar ruling was made in Hogan *v.* Harley.[3]

The prior case of Cobb *v.* Arnold[4] is still stronger. This was an action for use and occupation, and the defendant, who had taken a lease from the plaintiff, offered to prove that for thirteen years before the lease was taken, and up to the time of the trial, twelve years later, he had been in quiet, exclusive, and adverse possession of the land, using and treating it as his own all the time. But the evidence was refused.

It therefore seems to be a difficult matter to sustain the California cases upon the authority of the later decisions, even if it were conceded that the earlier ones were not opposed to the doctrine; which is not conceded, notwithstanding the skilful handling they have received from Mr. Justice Sanderson. We are apt to distrust the force of explanations, when one is needed for almost every one of a numerous class of cases; and the conviction presses upon us quite strongly, when so many eminent judges, who understand quite well the use and meaning of language, speak of misrepresentation, mistake, or fraud as an element necessary to the removal of the estoppel, that they must mean something, even though the point be not directly involved in the case in hand.

Considered upon principle as well as authority, we can at once put out of view the case of an attornment to one claiming under

[1] Hawes *v.* Shaw, 100 Mass. 187 (1868). See Trafton *v.* Hawes, 102 Mass. 533.

[2] Miller *v.* Lang, 99 Mass. 13 (1868).

[3] 8 Allen, 525.

[4] 8 Met. 398. See also First Parish *v.* Dow, 3 Allen, 369.

the original lessor. Nothing is more certain than that an attornment to such a person leaves the tenant in precisely the same position (so far as the question of the estoppel to deny the title of the lessor is concerned) as he was with the original landlord; he cannot dispute the title in the one case more than in the other, except by showing that the *derivative* title is defective, or that the attornment was made by fraud or mistake, or something akin.

The only room, then, for the question raised in California, is either in the case of an original lease, or when the attornment is made to a stranger to the title of the lessor. In such a case, is bare possession, without mistake, fraud, or the like, in the leasing or attornment, sufficient to remove the estoppel? Upon one plain ground we think not. The landlord may have changed his position, induced by the lessee's acceptance of a tenancy. There is every element here essential to an estoppel *in pais;* and without stopping longer than to refer to the fact that the doctrine that the act of the party against whom the estoppel is claimed must have been *wilful*, has been overruled,[1] it is enough to say that the case presents features quite as conclusive as those in the case of the estoppel of a tenant who has received possession from his landlord. The essential fact — aside from the fact of inducement, common to both cases — is the change of position by the landlord; and it is wholly immaterial what may be the nature or extent of the change, provided there has been a change in fact, so that the landlord would be placed in a less advantageous position, by allowing the denial of his title, than he would have occupied had not the tenancy been created. Just such a result might occur by making this innovation upon the rule of estoppel. The landlord may have been lulled into security by the acceptance of the lease or attornment, and in the mean time the period of limitations may have elapsed in favor of a third person, under whom the tenant may also be holding, — as mortgagor in possession, for instance. A rule of law which would lead to such a result can hardly be founded in principle, even if supported by authority. But it would seem that there must in fact have been a potential change of position in order to the estoppel; for if the landlord is still in the same advantageous position as before, there would seem to be lacking one of the elements of an estoppel.[2]

[1] Cornish *v.* Abington, 4 Hurl. & N. 549 (1859).

[2] It is held in a late case that the estoppel *in pais* by conduct may arise even where the damage is constructive. Knights *v.* Wiffen, Law R. 5 Q. B. 660 (1870).

It is worthy of notice, also, that the doctrine of the California court requires a still further step, — a denial of the existence of an estoppel even during the continuance of the term; for if there is an estoppel at all, it lasts until the contract has been wholly fulfilled. Now the contract of the tenant is not merely that he will pay rent, but also that he will *deliver the possession to the landlord* at the expiration of the lease. The estoppel, then, if it prevails at all, must prevail until the delivery of possession by the tenant. That it would be a still more doubtful proposition to hold that there was no estoppel during the term is evident from the language of Erle, C. J., in Accidental Death Ins. Co. *v.* Mackenzie.[1] In this case a tenant was permitted to deny the title of an assignee of the lessor after the term, but before surrender, the assignment not having been perfected, and the derivative title, therefore, not having been completed. But the chief justice expressly declined to say, even in such a case, that there might not have been an estoppel during the term. Moreover, the case seems to come within the language of Best, C. J., which implies that, if the tenant *will* take a lease in full knowledge that the landlord has no title, he must abide the consequences.[2]

Whether the doctrine of estoppel prevails in cases where the relation of landlord and tenant is created by operation of law was considered in Vance *v.* Johnson.[3] It appeared in that case that Vance had conveyed the real estate in question in trust to one Bailey, but that he remained in possession until his death, and that his widow continued in possession thereafter. After the conveyance in trust, the land was sold under execution to one Washington, from whom the widow of Vance took a lease; and the question was, whether, in her relation to Bailey, she had the legal right to take the lease from Washington. The court decided in the affirmative.

"This rule [of tenant's estoppel] cannot be held applicable," said McKinney, J., in delivering judgment, "to the same extent, to a case where no such actual relation exists; where the person in possession did not receive such possession from the legal owner; where there exists between them no privity, either of estate or contract; where there is no obligation on the part of the person in

[1] Fenner *v.* Duplock, 2 Bing. 10.

[2] 5 Law T., N. S., 20; S. C. 10 Com. B., N. S., 870, Am. ed.

[3] 10 Humph. 214.

possession to pay rent or other service, or pledge of faith to restore possession; in short, where there exist no reciprocal duties or obligations binding equally upon the parties, or either of them.

"The relation of mortgagor (suffered to remain in possession until foreclosure) to the mortgagee is, in some respects, like that of a tenancy at will, but it is not strictly such. And the relation of the conveyor in a deed of trust, to the trustee, is exactly similar. In the case of Moss *v.* Sallimore,[1] Lord Mansfield says, 'A mortgagor is not properly tenant at will to the mortagee, for he is not to pay him rent. He is so only *quodammodo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will.' The same doctrine is held by Buller, J., in the case of Birch *v.* Wright.[2] All the authorities, however, concur that the possession of the mortgagor is not to be regarded as adverse to the mortgagee; and so as regards the parties to a deed of trust, which stands on the same principle. In other words, the possession in such case will be presumed to be in subordination to the legal title, until proof of actual disclaimer. And this principle applies to all cases where the relation of landlord and tenant is created by mere operation of law. But there exists this important distinction between the actual and constructive relations. The tenant in the former case is not permitted to disclaim the landlord's title, or to set up an adverse possession, so long as the relation subsists.[3] But in the latter case there is no such restraint imposed upon the *quasi* tenant, as he is styled in some of the cases. He is not within the principle that precludes a tenant from setting up an adverse title or possession. His relation is founded upon mere acquaintance, and may be terminated at any moment. He may, while in possession, attorn to another, or acquire an adverse title in himself; and in either case the possession is thereby changed, and the Statute of Limitations will attach. And all this is perfectly consistent with the doctrine maintained by this court in the cases of Mitchell *v.* Lipe,[4] and Wood *v.* Turner,[5] and other cases upon the same subject. In the former case it was held that

[1] 1 Doug. 279, 282.

[2] 1 T. R. 378, 383.

[3] That is, the disclaimer cannot avail him during the tenancy; but after the tenancy has expired, he may avail himself of it from the time it was made known to the landlord, and set up a title in himself under the Statute of Limitations. Willison *v.* Watkins, 3 Peters, 43; *post*, pp. 401 *et seq.*

[4] 8 Yerg. 179.

[5] 8 Humph. 685, 689.

the title of the defendant in an execution, being transferred to the purchaser by the sale and sheriff's deed, his possession afterwards was consistent with the purchaser's title; and he would, therefore, be deemed to continue the possession in the character of a *quasi* tenant at will until an actual disseizin or disclaimer on his part. In Wood *v.* Turner it is held that the only restriction imposed by such *quasi* tenancy is to preclude the execution debtor, who remains in possession of the land sold at sheriff's sale, from requiring the purchaser, in an action of ejectment against the former, to produce any other evidence of title than proof of his (the defendant's) possession, a judgment and execution against him, a sale and purchase thereon, and a deed from the sheriff."

A very important qualification of the rule of the tenant's estoppel prevails in the case of a disclaimer. If the tenant disclaim to hold of his lessor, and notice of the fact be made known to him, his title then becomes adverse; the lessor may at once eject him from the premises; and if he fails to do so before the period of limitation has expired, the tenant may then set up his own title, acquired by adverse possession, or the title of any other person under whom he claims to hold. But he cannot set up such title in an action brought by the lessor before the expiration of the period of limitation.[1]

The subject is exhaustively reviewed in the case first cited, and stated to apply as well to the relations of mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where a person obtains possession of real estate belonging to another in subordination to his title. In this case Willison had been a tenant of one Bordeaux, under whom the plaintiff claimed, and afterwards Bordeaux was apprized that Willison claimed the premises by adverse title. It appeared that Willison had been in possession a sufficient length of time since the fact of his disclaimer came to the knowledge of Bordeaux to acquire a title under the Statute of Limitations, provided it should be held that he was entitled to the benefits of the statute. The action was trespass to try title; and the plaintiff contended that Willison was precluded from setting up title in himself, without first surrendering possession. But the court held otherwise.

[1] See Willison *v.* Watkins, 3 Peters, 43; Peyton *v.* Stith, 5 Peters, 485, 491; Walden *v.* Bodley, 14 Peters, 156, 162; Zeller *v.* Eckert, 4 How. 289; Doe d. Clun *v.* Clarke, Peake, Add. Cas. 239; Taylor, Land. & T. § 522, and cases cited.

It was an undoubted principle of law, the court observed, that a tenant could not dispute his landlord's title, either by setting up title in himself or in a third person, during the existence of the tenancy. He could not change the character of the tenure by his own act merely, so as to enable him to hold against his landlord, who reposed under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession. But the court did not think that the doctrine in this or in any of the analogous relations had been adopted to the extent contended for in the present case, which presented a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession beyond the period of limitation.

By the known disclaimer of Willison, the tenancy had been terminated, and Bordeaux had the right to treat him as a wrong-doer, holding adversely; and having the right to do so, he was bound to exercise his power. It would be an anomalous possession, which as to the rights of one party was adverse, and as to the other fiduciary, if after a disclaimer, known to the landlord, the tenant forfeited his possession and all the benefits of the lease. No injury could be done the landlord, unless by his own laches. If he sued within the period of limitation, he would prevail; and if he suffered the time to pass by without suit, it was but the common case of a party losing his rights by his own negligence.

The court then, having shown that the leading authorities[1] relating to trusts and mortgages coincided with the rule adopted by themselves, said: "All these principles bear directly on the case now before us; they are well-settled and unquestioned rules in courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorning to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why, then, should not the statute protect him, as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from

[1] Hovenden *v.* Annesley, 2 Schoale & L. 122; Hughes *v.* Edwards, 9 Wheat. 490, 607; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 497; and other cases.

the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the Statute of Limitations is a bar to the plaintiff's action."

The tenant may purchase the property from the landlord, and set up the title thus acquired against him.[1] In the case first cited — an action of covenant for rent — the defendant offered to show that he had become the purchaser, at execution sale, of the reversion of a portion of the demised premises, and the Supreme Court held the evidence admissible in mitigation of damages. And they said that, if the purchase had covered the entire reversionary interest of the landlord, the fact could have been alleged, and would have constituted a perfect bar to the action.

Mr. Justice Cowen, speaking for the court, said that the tenant could not deny that the landlord had a right to demise at the time the lease was given; nor could he defend on the ground that he had acquired an outstanding title adverse to that of the landlord. But this was the extent of the doctrine. If the landlord parted with his title pending the lease, the tenant would be bound to pay rent to the assignee; and should the tenant then buy in the assignee's right, the lease would be extinguished. And the result would be the same if the landlord should sell and release to the lessee. No action would lie for rent in these cases. And, therefore, had there been a sheriff's sale of the whole reversion, and the defendant had redeemed, or purchased under the judgment, no action could have been sustained; for a purchase or acquisition of title under a judgment against the lessor was the same thing as if the lessor had granted by deed.

But if the tenant be bound to pay the taxes and neglect to do so, he cannot buy in the title at tax-sale and set it up against his landlord. This would be to profit by his own wrong.[2]

The tenant is not estopped to allege that he was let into possession under a title from which the landlord's title was derived.[3] In the case cited, the plaintiff in ejectment claimed title to the premises in dispute through one Quinton Ford, by a conveyance in fee. Quinton had acquired the title by being put into possession by his

[1] Nellis *v.* Lathrop, 22 Wend. 121; Tilghman *v.* Little, 13 Ill. 239.

[2] Haskell *v.* Putnam, 42 Maine, 244.

[3] Ford *v.* Ager, 2 Hurl. & C. 279.

father, and occupying the premises for twenty-five years without payment of rent or other acknowledgment of the father's title. The latter, after putting his son into possession, mortgaged the property. After Quinton had conveyed to the plaintiff, and after he had attorned to him as tenant, he gave up possession, in consideration of a sum of money, to the representatives of the mortgagor (his father) and of the mortgagee, who united in a conveyance to the defendants. The question was whether the defendants were estopped by reason of their relation to the plaintiff. The court decided that they were not.

Channell, B., said that the case was distinguishable from Doe d. Bullen *v.* Mills.[1] Although up to a certain point it resembled that case in its facts, it differed from it in the circumstances under which the plaintiff's tenant was originally let into possession. The defendants did not seek to dispute the plaintiff's title, but to show an affirmative title in themselves from which any title the plaintiff had was derived.

The cases show that a tenant may prove that one to whom he has paid rent by attornment has no *derivative* title from his original lessor. Doe d. Higginbotham *v.* Barton[2] was such a case. It was an ejectment for certain lands in Cheshire. On the trial the plaintiff proved that one Morton, being seized in fee of the premises in controversy, demised a part to the defendant, Barton, as tenant from year to year. Subsequently he assigned all the premises by way of mortgage to Higginbotham, the plaintiff; whereupon Barton, on demand made by the plaintiff, paid the rent to him for several years. In the mean time the plaintiff demised the part not leased to Barton to one Bullock, who, having paid rent for a year and upwards, then underlet to Warburton, the other defendant. Subsequently both Barton and Bullock refused to pay rent to the plaintiff, who then served notices to quit. The defence was that Morton had mortgaged the same premises to one Marriott in fee prior to the mortgage to the plaintiff, but that he (Morton) had remained in possession; that Marriott had conveyed the premises in fee to one Woodhead, and that Woodhead had given notice to the defendants to pay the rent to him, which they obeyed, refusing to pay longer to the plaintiff. The question raised was whether the defendants were estopped to make this defence. The court held that they were not.

[1] 2 Ad. & E. 17.

[2] 11 Ad. & E. 307.

Lord Denman, who delivered the judgment in this important case, said: "Supposing the facts to be as above stated, it is clear that the lessor of the plaintiff never had any legal estate, and he must rely on the rule with regard to landlord and tenant. That rule is fully established, viz., that the tenant cannot deny that the person by whom he was let into possession had title at that time, but he may show that such title is determined.[1] With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by payment of such rent if he can show that it was paid under a mistake. These defendants, therefore, stand in different situations. Warburton is precluded from denying that the lessor of the plaintiff ever had a title, and must show that such title as he had is determined. Barton is precluded from denying that Morton had a title, but he is at liberty to deny that the lessor of the plaintiff ever had any derivative title from Morton, unless the payment of rent concludes him. We do not think that he is so concluded, because he, being tenant to Morton, and having notice of a subsequent mortgage by Morton to the lessor of the plaintiff, had no right to question it; nor, until he received notice from Woodhead of the prior mortgage, had he any reason to doubt that the legal estate had passed to the lessor of the plaintiff. He may truly be said to have paid the rent under a mistake; and then he may show, not that Morton had not a title by which he (Barton) would be estopped as against Morton himself, but that Morton's title was not such a one as would enable him to pass a legal estate to the lessor of the plaintiff. If the evidence had been received, he would have shown that Morton had only the equity of redemption, and that nothing more passed to the lessor of the plaintiff from Morton. And this, we think, he was at liberty to show, though if there had been a demise in the declaration by Morton himself, it might have been otherwise."

This doctrine that a tenant is not estopped to deny the validity of a derivative title is also illustrated by the recent case of Hilbourn *v.* Fogg.[2] This was an action of tort for ejecting the plaintiff from a room in a house in Charlestown. It appeared that McGrath, one of the defendants, was tenant at will of the house, and that the plaintiff was tenant at will under her. Subsequently

[1] Doe d. Knight *v.* Smythe, 4 Maule & S. 347.

[2] 99 Mass. 11 (1868).

McGrath made a written lease to Fogg, who, with the assistance of McGrath and other defendants, after due notice to quit, entered the plaintiff's room and removed her effects. It was contended, on the part of the defendants, that the plaintiff was estopped to maintain the action; but the court ruled otherwise.

The well-settled rule of law, the court, by Mr. Justice Gray, observed, by which a tenant entering under an oral lease is estopped, so long as he continues in possession thereunder, to deny the lessor's title at the time of making the lease, as against the lessor, his heirs and assigns, is founded on the injustice of allowing one who has obtained possession by admitting the title of another, to deny the title, and, in case of failure in proof of it, hold the premises. "The rule holds good," said the court, "where the actual title of the lessor is that of a mere tenant at will, and applies in every form of action by which the lessor may seek to assert the rights reserved or promised to him in his lease.[1] But it is equally well settled that the tenant is not estopped to deny that since his own entry into possession his lessor's title has expired, either by its own limitation, or by the act of the lessor, or by eviction by title paramount; and that when the estoppel is set up by one claiming as assignee of the lessor, the tenant may show that such assignment was ineffectual to pass the lessor's title.[2] In Doe [d. Higginbotham] *v.* Barton, [*supra*] Lord Denman said that if the lessor had been strictly tenant at will of another, no doubt his tenant might have shown the determination of that will on the part of the lessor's lessor.

"In this case, the plaintiff occupied her room as tenant at will of McGrath, and, while this tenancy at will continued, might maintain an action against McGrath, or any person claiming under her, for disturbing the plaintiff's possession.[3] McGrath made a written lease of the room to Fogg, which, if the lessor had had a sufficient title, would have terminated the tenancy at will of the plaintiff, and prevented her from maintaining this action for the removal of her goods.[4] But the report finds that McGrath did not own the

[1] Coburn *v.* Palmer, 8 Cush. 124; Towne *v.* Butterfield, 97 Mass. 105.

[2] England *v.* Slade, 4 T. R. 682; Doe d. Marriott *v.* Edwards, 5 Barn. & Ad. 1065; Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307; S. C. 3 Per. & D. 194; Mountnoy *v.* Collier, 1 El. & B. 630; London & Northwestern Railw. Co. *v.* West, Law R. 2 C. P. 553; Despard *v.* Walbridge, 15 N. Y. 374.

[3] Dickinson *v.* Goodspeed, 8 Cush. 119.

[4] Curtis *v.* Galvin, 1 Allen, 215; Pratt *v.* Farrar, 10 Allen, 519.

estate, and was herself a mere tenant at will of the rightful owner, and could not, therefore, make a valid alienation by written lease which would give Fogg a better title than she had previously granted to the plaintiff.[1] This fact is in no way inconsistent with her title as lessor at will of the plaintiff; and the plaintiff, by having entered into possession as her tenant at will, was not estopped to deny that she had any greater estate, and to maintain this action."

The tort in this case, it will be noticed, was committed by Fogg, and McGrath and the other defendants evidently stood in the relation of agents to him. Had McGrath expelled the plaintiff, after properly putting an end to the lease, it is plain that the action could not have been maintained; for the plaintiff would not have been permitted to question the lessor's title. The ruling in the case was simply to the effect that the plaintiff was not estopped to say that no title had passed by the subsequent lease to Fogg.

The case of Claridge *v.* Mackenzie[2] considers the subject of a new taking or letting into possession. The action was trespass for two distresses for rent. The facts in brief were, that the plaintiff, having derived possession from a third person, paid rent to the defendant, who was in fact a termor. After the latter's term had expired, but not to the knowledge of the plaintiff, the plaintiff entered into an agreement with the defendant for a tenancy, and in pursuance thereof paid rent to him. The court held that the plaintiff was not estopped to show that the distresses complained of were illegal, on the ground that the defendant's title had expired.

Chief Justice Tindal came to this conclusion upon two grounds: First, that there was no new taking of the premises by the plaintiff, or any letting into possession by the defendant; and, secondly, that even assuming there was a new taking or letting into possession, the jury had found that the transaction had taken place without a knowledge, on the part of the plaintiff, of the circumstances.

"Upon the first point," said he, "I think it was competent for the plaintiff to show that the defendant's title had expired. The plaintiff was in possession of the premises; and after the expiration of the defendant's interest, he continued to occupy, as tenant by sufferance, under the party who was entitled to the intermediate

[1] Cooper *v.* Adams, 6 Cush. 87, 90. [2] 4 Man. & G. 143.

term of three quarters of a year. The witness Richards speaks of a new agreement having been entered into between the plaintiff and the defendant, that the former should continue in possession as tenant to the latter; but there was no new possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises which had been formerly occupied by the tenant. . . . . In effect, all that the plaintiff proposes to do in this case is, to show that the defendant at one time had a good title, which has since expired."

Mr. Justice Coltman said: "If the plaintiff was not let into possession by the defendant, it is clear that he is not precluded from showing that her title is at an end. What, then, is the meaning of being let into possession? The plaintiff, it is admitted, was not let into corporeal possession by the defendant; he had been let in by Tillbury, quite independently of Mackenzie. But then it is argued that in July, 1838, the plaintiff entered into an agreement to take the premises from the defendant; and I think that such must be considered to be the result of the evidence. And if she had a legal right at that time, and might have turned the plaintiff out of possession, I am not prepared to say but that he must have formally surrendered to the defendant. But the infirmity of the defendant's case consists in this, that at the time of this agreement she had, in fact, no power to turn the plaintiff out of possession, and I think, therefore, that he cannot be said to have been let in by her. The question then is, Was this agreement made under a mistaken notion as to the facts? This point was properly left to the jury, and they have found in the affirmative."

When the relation of landlord and tenant is established, the rule of estoppel upon the tenant prevails, though the tenancy be created by a deed which shows that the landlord possessed no legal estate,[1] unless, possibly, the nature of the action requires a legal estate to support it, as in the case of ejectment or covenant. This

[1] Jolly *v.* Arbuthnot, 4 DeG. & J. 224; Dancer *v.* Hastings, 12 Moore, 34; S. C. 4 Bing. 2; Morton *v.* Woods, Law R. 4 Q. B. 293; Cornish *v.* Searell, 8 Barn. & C. 471.

doctrine is an important qualification to the rule that there is no estoppel where the truth appears.

In the case first cited the question raised was, whether the relation of landlord and tenant had been created by a receivership deed between the receiver and another party, a bankrupt, so as to give the receiver the right to distrain for rent; the deed showing an attornment by the bankrupt to the receiver, and at the same time showing that the legal title was not in the latter. "It is contended," said Lord Chancellor Chelmsford, "that the attornment to Aplin [the receiver] had no operation; not by agreement, because he had no interest in the land to which it could apply; nor by estoppel, because the deed sets forth the rights and interests of all parties, and shows that Aplin had no reversion in the premises to which the power of distress could be incident. It appears to me, however, that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done."

In the still more recent case of Morton *v.* Woods, above cited, in which the same point arose, Kelly, C. B., in delivering judgment, remarked, as to the objection that the defendants, not having the legal estate, could have no right of distress: "That they had not, in fact, the legal estate, is clear; but that may be said of all lessors where there is a lease and a tenancy by estoppel, and where the lessors have frequently no title at all. Here the defendants have an equitable title only, and the question becomes of primary importance, because it is only by estoppel that the defendants can be said to have the legal estate, and it is said that no estoppel arises where the truth appears upon the face of the instrument which is the evidence of the agreement between the parties; and it may be taken, as appears on the mortgage deed, that the defendants were not seized of the legal estate, but that it was in the first mortgagee, Mr. Horn. A number of cases bearing on this point have been cited; but when we come to look at the facts, and the *ratio decidendi* of each, none of them are directly in point. They were either actions of covenant, in which the covenant must be enforcible as an obligation at law, or actions of ejectment on a clause of re-entry, where it is perfectly clear there must be the

legal estate in the plaintiff, and that if it is outstanding he cannot succeed.[1] But even if any of the decisions or *dicta* were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of Jolly *v.* Arbuthnot.[2] . . . . There is undoubtedly this difference between Jolly *v.* Arbuthnot and the present case, that the mortgagee was a party to the deed in that case, whereas the original mortgagee is not a party to the agreement in this; but it is the creation of the tenancy, or the estoppel which arises from the creation of the relation of landlord and tenant by agreement between the parties, that makes the actual legal estate unnecessary to support the distress, and not the consent of the third party in whom the legal estate is. Therefore the two cases are essentially identical, and if we had any doubt on the subject, which we have not, we should be bound by that authority; and we therefore hold that the right of distress, so far as this point of the want of the legal estate is concerned, is unaffected by the fact that such want of the estate appeared on the agreement by which the relation of landlord and tenant was created between the parties."

The only case directly holding that where the deed shows that the lessor had not a legal reversion the lessee may dispute the title in an action upon the covenants is Pargeter *v.* Harris;[3] though the doctrine is referred to with approval in a *dictum* by Martin, B., in the subsequent case of Cuthbertson *v.* Irving.[4] The distinction must be a fine one which will allow the tenant, in a lease showing the facts, to dispute the title in covenant, and refuse him the power in a contest concerning the validity of a distress. The doctrine of the cases of Jolly *v.* Arbuthnot and Morton *v.* Woods, above presented, seems sound, and they leave a very narrow ground for Pargeter *v.* Harris and the like cases to stand upon.

The question arose again in a late case in the Exchequer.[5] In the case cited the plaintiff had granted a lease to the defendant which recited that it was subject to a prior lease to other persons. The action was ejectment, and it was admitted that the covenant

[1] The cases referred to are Pargeter *v.* Harris, 7 Q. B. 708; Cuthbertson *v.* Irving, 4 Hurl. & N. 742; S. C. in error, 6 Hurl. & N. 135; Saunders *v.* Merryweather, 3 Hurl. & C. 902. See *ante*, pp. 294, 329–331.

[2] 4 DeG. & J. 224. *Supra.* The learned judge of course means overruled so far as the point under consideration is concerned.

[3] 7 Q. B. 708.

[4] 4 Hurl. & N. 742.

[5] Duke *v.* Ashby, 7 Hurl. & N. 600 (1862).

to repair had been broken, and that rent had been paid to the plaintiff under his lease. It was objected by the defendant that the plaintiff could not recover, because it appeared from the face of the lease that there was an outstanding title. But the objection was overruled.

"The question," said the chief baron, in the course of the argument, "is whether, when a person accepts a lease admitting upon the face of it some infirmity of title in the lessor, the doctrine applies that there is no estoppel where all the facts appear. I do not think that that technical doctrine of estoppel applies to the case of landlord and tenant. Suppose a mortgagor in possession grants a lease; could the lessee dispute his title because the legal estate is in the mortgagee?"[1] But he said the case would have been different had the defendant obtained an assignment of the prior lease.

A similar point arose in the recent case of Holt *v.* Martin.[2] This was an ejectment by Martin, in which it appeared that he, being owner of an undivided seventh part of a house, leased the whole in his own name as agent. Having conveyed away his interest, he brought the present action. The defendant, Holt, attempted to show that the owners of the other interests had revoked Martin's agency, but the court held the evidence inadmissible.

"At first sight," said Agnew, J., for the court, "this might seem competent, but a close inspection discloses a direct conflict with the rule that a tenant shall not dispute the title of his landlord as it was when he took the lease. It was Martin who let the premises to Holt. The relation of landlord and tenant, by the terms of the lease, was exclusively between them. The covenants were those of Martin and Holt alone, and the sealing and delivering also. Upon any breach of the lessor's covenants the action would lie against Martin and no other. Martin simply described himself as 'agent,' — no more, no less, — and it is thought this opened the door to the proof. But agent for whom, or for what? We are not informed. Was he a mere agent without an estate; or, himself holding the legal title, was he an agent for purposes connected with the title he held? None of these appear by the lease. And if agent for others, were they the same persons indicated in the offer? If not, clearly Martin could rebut the proof

[1] See Cuthbertson *v.* Irving, 4 Hurl. & N. 742; S. C. in error, 6 Hurl. & N. 135.

[2] 51 Penn. St. 499 (1866).

offered. His calling himself agent was no admission of title in the persons named in the offer. Thus it was a direct attempt to deny the title of Martin; for, if competent, it showed title in third persons, and brought on directly a conflict upon the title of Martin, and not upon the mere termination of the lease."

That the doctrine that the tenant cannot dispute his landlord's title is not confined to the action of ejectment was decided in Delaney *v.* Fox.[1] This case was an action of trespass upon certain premises. The defendant pleaded *liberum tenementum*, and a special plea showing a tenancy of the plaintiff under him, and its determination by notice. The plaintiff gave evidence that at the time she was let into possession by the defendant he had no title, but that the title was in a third person, to whom the plaintiff under a threat of distress paid rent. It was objected that she was estopped from disputing the defendant's title; but counsel on the other side contended that the rule of estoppel was confined to the action of ejectment, and did not apply to trespass.[2] The court decided in favor of the defendant.

Cockburn, C. J., said that, upon principle, there was no distinction between the case of ejectment and the present case. There could be no substantial difference between the landlord's asserting his title by bringing ejectment at the immediate expiration of the term, and his asserting it in defence of an action of trespass at a future period. On the other hand, there had not even been a constructive eviction in the case; and even if there had been, he doubted whether such an eviction could be considered as a determination of the landlord's title.[3]

The doctrine of the tenant's estoppel prevails against one who is in possession of land under a mere license.[4]

It is said that if a person take possession of land under a mortgagee, not as his tenant, but as devisee of the mortgagor, to keep possession, keep the fences in repair, pay the taxes, and enjoy the rents and profits, without paying rent, and not recognizing an absolute title in the mortgagee, he will not be estopped to dispute the mortgagee's title.[5]

[1] 2 Com. B., N. S., 768.

[2] Referring to the language of Pollock, C. B., in Watson *v.* Lane, 11 Ex. 769, citing Heath, J., in Ogle *v.* Atkinson, 5 Taunt. 759.

[3] That constructive eviction is sufficient to remove the estoppel in America, and probably also in England, see *ante*, pp. 387, 388.

[4] Glynn *v.* George, 20 N. H. 114; *ante*, p. 384.

[5] Sahler *v.* Signer, 37 Barb. 329.

It is within the doctrine of these cases that a tenant by the curtesy cannot allege that the title of his wife was defective.[1] The case cited was an action of waste, alleged to have been committed by the defendant, occupying as tenant for life. The plaintiff claimed title under a deed from the defendant's wife. It appeared that the latter's title had been derived from a location which it appeared was irregular and defective. The defendant for this reason objected that the location had given no title to his wife; but the court overruled the objection.

Mr. Justice Hubbard said that the title of the plaintiff was voidable, but the defendant was not in a position to take advantage of any defect in it, since he had entered under his wife's right, and held as tenant by the curtesy, subject to the rights of the children. He was estopped to deny the title under which he entered, by alleging that he was now a disseizor.

So where a judicial deed has been granted to a party, imposing upon him certain duties, he cannot, while claiming under the deed, excuse himself from performance of the duties on the ground that the order of court, under which the deed was made, was defective, so that no title was passed by the deed.[2]

In regard to the relation of mortgagor and mortgagee, without attempting to define it, it is sufficient to say, that when the mortgagor retains possession, a relation is created *similar* to that of landlord and tenant, and the mortgagor is estopped to deny the title of the mortgagee, unless, after a distinct disclaimer brought to the knowledge of the latter, he has acquired a title by adverse possession.[3]

And the same principle seems to prevail in the cases of those trusts which are the mere creatures of a court of equity.[4] The possession of the trustee not being adverse to the *cestui que trust*, as between them the act of limitations does not run unless there is a clear repudiation of the trust, brought home to the party so as to require him to act as upon a clearly asserted adverse title.[5]

[1] Morgan *v.* Larned, 10 Met. 50.

[2] Woburn *v.* Henshaw, 101 Mass. 193.

[3] Doe d. Higginbotham *v.* Barton, 11 Ad. & E. 307, 314; Partridge *v.* Bere, 5 Barn. & Ald. 604; Hitchman *v.* Waltman, 4 Mees. & W. 409; Moss *v.* Sallimore, 1 Doug. 279, 282; Birch *v.* Wright, 1 T. R. 378, 383; Vance *v.* Johnson, 10 Humph. 214; Willison *v.* Watkins, 3 Peters, 43, 52.

[4] Kane *v.* Bloodgood, 7 Johns. Ch. 90; Willison *v.* Watkins, 3 Peters, 43, 52; Vance *v.* Johnson, 10 Humph. 214.

[5] Merriam *v.* Hassam, 14 Allen, 516, 522; Baker *v.* Whiting, 3 Sum. 475. See Perry, Trusts, §§ 863, 864, and cases cited.

2. *Estoppel of Vendee in Equity.*

The relation which the purchaser of land not fully paid for bears to the vendor is held to be the same in equity as that between landlord and tenant, so far as the doctrine of estoppel is concerned.[1] In Bush *v.* Marshall, just cited, it appeared that Bush, having purchased the premises in controversy from one of the plaintiffs, who at the time had no title, subsequently acquired the title, and then sought to escape the payment of the residue of the purchase-money, for which Bush had given a mortgage. The plaintiffs now filed a bill to foreclose the mortgage; and their suit was sustained.

"As to lot No. 7," said Grier, J., for the court, "Bush, having obtained possession under Whitesides, cannot, by the purchase of an outstanding title, defeat the claim of his vendor. It is a well-established rule of equity that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title.[2] Equity treats the purchaser as a trustee for his vendor, because he holds under him; and acts done to perfect the title by the former, when in possession of the land, enure to the benefit of him under whom the possession was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant. The vendee cannot disavow the vendor's title.[3] In the present case the vendee has bought in, for twenty dollars, the legal title to a property worth more than two thousand, the possession of which he received from his vendor; and not only so, but, contrary to good faith and fair dealing, he has interfered to overbid his vendor, who was using every endeavor to purchase the title for the use of his vendee, in fulfilment of his own covenants. The appellant has paid no more .... than he agreed to pay for the purpose of getting the legal title. He has got a good title to the property, and ought in justice and

[1] Galloway *v.* Finley, 12 Peters, 264, 295; Williams *v.* Watkins, 3 Peters, 43, 48; Bush *v.* Marshall, 6 How. 284, 291; Bowers *v.* Keesecker, 14 Iowa, 301, 305. In Williams *v.* Watkins, *supra*, the court remarked that the same principle applies also between trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title.

[2] Searcy *v.* Kirkpatrick, Cooke, 211; Mitchel *v.* Barry, 4 Hay. 136.

[3] Quoting the language of Mr. Justice Catron in Galloway *v.* Finley, 12 Peters, 264, 295.

equity to pay for it the full consideration which he has covenanted to pay."

The doctrine of this case is, that until the grantee has paid for the land, he holds, *in respect to the payment*, a relation of duty to the grantee similar to that of a tenant to his landlord. The case cannot be considered as holding that the relation exists beyond the duty to pay the purchase-price. It is certain, as we have seen, that a grantee holds adversely to his grantor, and, while in possession, may disclaim the title of his grantor, or purchase an outstanding title and claim under that.[1] But, according to the doctrine of the case above presented, the grantee could not, by this means, escape the payment of the price agreed upon.

A different principle has, however, been held in a late case of peculiarly complicated circumstances.[2] It was a bill to redeem a prior mortgage. The defendants were mortgagees under one Harris, who, after giving the mortgage, conveyed to one Green, who took possession and gave a mortgage to the complainants, who foreclosed and obtained a deed. Green afterwards quitclaimed to the defendants, who then took and retained possession. Harris, the first person mentioned, had, prior to all these transactions, given a mortgage to one Bacon, who had obtained a decree of sale and assigned it to the defendants. No sale had been made, and the bill was filed to redeem this first mortgage, and to require the defendants to account for the rents and profits. The defendants now attempted to dispute Green's title, but were not allowed to do so.

It will be noticed that if the complainants had not foreclosed Green's mortgage and obtained the deed under which they claimed, it would have presented the simple case of mortgagors in possession; for by the quitclaim deed from Green the defendants would have merely acquired his equity of redemption. And, standing in Green's shoes, they would have stood in the relation of tenants at will, estopped to deny the complainants' title.[3] But the case having gone a step further, and the complainants having foreclosed and obtained a deed, it may be worthy a *quære* if the parties were not now holding adversely to each other. But the case is so complicated in its facts that it would be quite unsafe to predicate any conflict or rule upon it.

[1] *Ante*, pp. 289 *et seq.*; Croxall *v.* Shererd, 5 Wall. 268, 287, and cases cited.

[2] Farmers' & M. Bank *v.* Bronson, 14 Mich. 361 (1866). See also Walker *v.* Sedgwick, 8 Cal. 398.

[3] Hilbourn *v.* Fogg, 99 Mass. 11.

The relation of landlord and tenant is also created where a party enters into possession of land under a contract to purchase it; and such a person will not be permitted, in an action for possession by the party under whom he entered, to set up a title inconsistent with his.[1]

3. *Estoppel of Bailee to deny Bailor's Title.*

Cheesman *v.* Exall[2] is an important case upon the relation of a bailee to his bailor. The action was trover for plate. It appeared that the plaintiff sold the plate to May and Biggenden, for a valuable consideration, but for the purpose of defeating an execution. He, however, retained possession of the goods, and the judgment creditor assigned his judgment to May and Biggenden. They issued execution, whereupon the plaintiff deposited the plate with the defendant. The latter now, in the suit to recover the goods, set up the title of May and Biggenden. The court held that he had the right to do so.

Chief Baron Pollock said: "My impression is, that if a person pledges with another property to which he has no title, and which he has no right to pledge, the real owner may interpose and get possession of the property. In the administration of the criminal law, it constantly occurs that where stolen property has been pledged, the pawnbroker is called upon to deliver it up to the rightful owner. If the servant illegally pledges his master's plate, the servant cannot recover it by an action, since the pawnbroker may inquire who is really the true owner and deliver it to him." He also referred to Ogle *v.* Atkinson,[3] as deciding that a warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them if they are the property of another.

Mr. Baron Martin thought, however, that Heath, J., had expressed the doctrine too broadly, in the case just cited, in saying that the rule against setting up the *jus tertii* was limited to the action of ejectment. "I do not concur," said he, "in thinking that there is no case except that of land in which the *jus tertii* may not arise. There are numerous cases in connection with wharfs and

[1] Towne *v.* Butterfield, 97 Mass. 105; Tilghman *v.* Little, 13 Ill. 239; Den d. Love *v.* Edmonston, 1 Ired. 152; Winnard *v.* Robbins, 3 Humph. 614; Sayles *v.* Smith, 12 Wend. 57; Jackson *v.* Ayers, 14 Johns. 224; Jackson *v.* Walker, 7 Cowen, 637.

[2] 6 Ex. 341.

[3] 6 Taunt. 759.

docks, in which, if the party intrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business."

The case of Biddle *v.* Bond[1] contains a clear exposition of the doctrine, and a review of the more important English cases. The case was this: The plaintiff had seized goods of one Robbins under a distress for the rent of a house alleged to have been demised by the plaintiff to Robbins, and had delivered them to the defendant, an auctioneer, to sell by auction. When the sale was about to begin, Robbins served a notice on the defendant that the distress was void, as the relation of landlord and tenant did not exist between the plaintiff and himself, and there was no rent in arrear. By the notice he required Robbins not to sell the goods, or, if he sold them, to retain the proceeds for him. The defendant sold the goods, but refused to pay the proceeds over to the plaintiff, relying on the right of Robbins. And the court sustained him.

Blackburn, J., in delivering judgment, said: "We do not question the general rule that one who has received property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it. . . . . But the bailee has no better title than the bailor, and, consequently, if a person entitled, as against the bailor, to the property, claims it, the bailee has no defence against him.[2] Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or, waiving the tort, had sued for money had and received, the defendant would have had no defence. He was therefore compelled to yield to Robbins's claim; and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited on the argument at the bar, and more might have been cited, such as Stonard *v.* Dunkin,[3] Gosling *v.* Birnie,[4] and Hawes *v.* Watson,[5] in which a bailee who, by attorning to a purchaser of the goods, has in effect represented to him that the property has passed to him, though such was not the fact, and has thereby induced him to alter his position and pay the price to his

[1] 34 Law J. N. S. Q. B. 137.

[2] Wilson *v.* Anderton, 1 Barn. & Ad. 450.

[3] 2 Camp. 344.

[4] 7 Bing. 339.

[5] 2 Barn. & C. 540.

vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all these cases the estoppel proceeded upon the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out by Parke, B., in Cheesman *v.* Exall,[1] in the case of a pledge, and is indicated as one of the grounds on which the judgment of the Court of Common Pleas proceeded in Sheridan *v.* The New Quay Company,[2] which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or misrepresentation on his part, is very analogous to that of a tenant who, having accepted the possession from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz., in Shelbury *v.* Scotsford.[3] Then the plaintiff sued in *assumpsit* against the bailee of a horse for the breach of his contract to redeliver it. The defendant pleaded that J. S., the true owner of the horse, took it from the defendant. After verdict for the defendant, the plaintiff moved in arrest of judgment; but 'by Fenner and Yelverton, contra, for the matter alleged by the defendant does in law discharge the promise, by reason of the former property of the horse in J. S.; and then it is, as it were, an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants in any sort depending upon the interest.' In Wilson *v.* Anderton,[4] Littledale, J., without referring to Shelbury *v.* Scotsford, but evidently having it in mind, states the law to the same effect. And accordingly, in Hardman *v.* Willcock,[5] in Cheesman *v.* Exall,[6] and in Sheridan *v.* The New Quay Company,[7] a bailee was permitted, under circumstances simi-

[1] 6 Ex. 341; *supra*, p. 416.
[2] 4 Com. B. N. S. 618.
[3] 1 Yelv. 22.
[4] 1 Barn. & Ad. 450.
[5] 9 Bing. 382.
[6] 6 Ex. 341.
[7] 4 Com. B. N. S. 618.

lar to the present, to set up the *jus tertii*. It is true that in the first two of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrong-doer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in Shelbury *v.* Scotsford, viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in Betteley *v.* Reed,[1] that 'to allow a depositary of goods or money who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever.' Nor is it enough that an adverse claim is made upon him, so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B., in Thorne *v.* Tilbury,[2] that a bailee can set up the title of another only 'if he depends upon the right and title, and by the authority of that person.' Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences."

A case of this kind was recently tried in the Supreme Court of Michigan.[3] It appeared that the plaintiff below and one Samuel Sinclair, a brother of the defendant, had been in partnership as sutlers in the army, and that Samuel went home and did not return; that thereafter the plaintiff continued the business in his own name, claiming to have bought out his partner. Subsequently the defendant induced the plaintiff to allow him to take away and put on deposit in bank a portion of the funds, to be kept subject to the plaintiff's order. The plaintiff afterwards inquired of the defendant whether he had made the deposit as agreed, whereupon the defendant claimed the money as his own; and this

[1] 4 Q. B. 511.
[2] 3 Hurl. & N. 534, 537.
[3] Sinclair *v.* Murphy, 14 Mich. 392 (1866).

resulted in the present action. The court held that the defendant could not question the plaintiff's right to the money.[1]

Mr. Justice Cooley, speaking for the majority, said: "The dealing of the defendant was not with any partnership, but with the plaintiff as an individual; and having agreed to account for the moneys to the plaintiff, he cannot be permitted to retain them in violation of this understanding, while the plaintiff litigates with him the right of some third person to an interest therein, a right in which the defendant is in no way concerned. Whether Samuel Sinclair still continued a partner or not would be immaterial in any controversy between the plaintiff and mere wrong-doers; for having the rightful possession of the property, as well as an interest in it, he would be entitled to maintain his possession against any one asserting no right in himself; and there can be no doubt that this possession and interest would be ample consideration to support the promise of any one who, on receiving any of the property from him, should promise to return it. Defendant does not claim to have acted on behalf of Samuel Sinclair in obtaining this money; nor does his testimony show that his agency would have warranted any interference in the business. As to the dealings between the plaintiff and Samuel Sinclair, the defendant was, in law, a stranger; and he has no right to draw them into controversy for the purpose of defence to his own contract."

Upon this subject Leonard J., in a late case,[2] says: "No principle of law can be found which permits a debtor for goods sold, or for money lent or deposited, to set up as a defence against the claim of his creditor that his title to the goods sold, or money lent or deposited, is defective or wrongful. That question is of no concern to the purchaser or borrower, unless the third party who claims to have been despoiled of his goods or money will proceed, by process of law, to enforce his rights. It can never be permitted that a debtor may volunteer, by plea or answer, the protection of the claims of those with whom he has had no dealings, to defeat his liability for the performance of his contracts."[3]

[1] Campbell, J., dissented.

[2] Lund *v.* Seaman's Bank, 37 Barb. 129 (1862).

[3] See Placer County *v.* Astin, 8 Cal. 303; Hayden *v.* Davis, 9 Cal. 573; King *v.* Richards, 6 Whart. 418; Hardman *v.* Willcock, 9 Bing. 382.

An officer who has levied upon goods and claimed to hold them as the plaintiff's is not estopped to deny that they are the plaintiff's property. Roberts *v.* Wentworth, 5 Cush. 192.

The case of the delivery of the proceeds of goods sold by a bailee rests upon similar principles. In Osgood *v.* Nichols,[1] the plaintiff sued the defendant for money had and received for goods intrusted to him by the plaintiffs, and sold by him as auctioneer. The defendant offered to show property in himself, but the evidence was excluded.

The court, by Metcalf, J., said: "We are of opinion that the evidence which the defendant offered at the trial was not admissible, either as a defence to the action or in reduction of damages. The goods were intrusted to him for sale as an auctioneer, and he received and sold them in that capacity. He made no claim on them as his property until he was called upon for the proceeds of the sale. And it neither appears, nor is suggested, that he acted in the sale under any ignorance or misapprehension of his own rights. If the goods were his, he purposely misled the plaintiff, and is estopped to make the defence which he now offers."

A wharfinger who agrees to hold goods under a delivery order cannot resist trover for them on the ground that they have never been separated from bulk, and that no property passed to the person delivering.[2]

It is held also that the estoppel does not prevail against a vendee of the bailee.[3]

4. *Grantee in Warranty Deed reconveying in Mortgage.*

Where a grantee of land, which has been conveyed with warranty, reconveys in mortgage with warranty, to secure the purchase-money, there is no estoppel against him to show an outstanding title and an eviction.[4] In the case first cited, Norton and Stocking sold to the plaintiff a piece of land, and warranted the title. They then took a mortgage of the property, with like covenants of warranty, to secure the payment of the consideration.

"And it is now claimed," said Williams, C. J., speaking for the court, "that the last covenants preclude or estop the plaintiff from a right of action on the others, because, it is said, they are simultaneous. Unless all principles of common sense are discarded, we must suppose that the deed of the defendants conveying the land

[1] 5 Gray, 420.

[2] Woodley *v.* Coventry, 9 Jur. N. S. 548; S. C. 2 Hurl. & C. 164.

[3] McFerrin *v.* Perry, 1 Sneed, 314.

[4] Hubbard *v.* Norton, 10 Conn. 422; Hardy *v.* Nelson, 27 Maine, 525; Brown *v.* Staples, 28 Maine, 497; Haynes *v.* Stevens, 11 N. H. 28. See Gilman v. Hoven, 11 Cush. 330.

in fact preceded that of the plaintiff, which was given to secure the consideration money for the land so conveyed. There must, then, have been a seizin in the plaintiff, under and by virtue of the defendants' deed to him. . . . .

"If, then, we must consider the plaintiff's deed as subsequent to that of the defendants, it can be no estoppel, because a warranty of title by the plaintiff, in a subsequent deed, will not prove that the defendants had title when they conveyed to the plaintiff; for the plaintiff might, at that time or immediately after, have purchased in another title, or removed the encumbrance. The contrary is not so clearly implied as to become one of those presumptions of law which cannot be rebutted. To create that legal certainty requisite to constitute an estoppel, the defendants must show that the plaintiff could have no other title than that acquired by deed of the defendants. It may be improbable, but surely is not impossible. The fact that the plaintiff had a title when he reconveyed it to the defendants, is consistent with the fact that the defendants had not a perfect title when they conveyed to the plaintiff.

"Again, it is said, these facts form a good defence, because the law abhors a circuity of action; and if the plaintiff can recover of the defendants, they can also recover of the plaintiff. This objection presupposes what is not admitted, that the plaintiff had not procured a title when his deed was given, or since that time. If the plaintiff had proved such a deed, when he gave his, then the defendants could not recover anything upon their covenants in the mortgage deed. If they have since gained such title, and removed such encumbrance, then only nominal damages can be recovered; and unless the court can see that the same damages must be recovered by the one party as by the other, the suit will not be barred for fear it will produce another."

This subject came before the Supreme Court of Massachusetts in Sumner *v.* Barnard.[1] In this case, the grantor, having conveyed with covenants of warranty, and having taken back a mortgage with similar covenants, was sued by his grantee by reason of a partial eviction. It was contended in this case, also, that as the defendant had a precisely similar demand against the plaintiff, it should operate as a rebutter to the present action to avoid circuity. But the court decided otherwise.

[1] 12 Met. 459.

"The principle of rebutter," observed the court, "is one well known in law, and is to be applied in all proper cases. The present does not seem to us to be one to which it is applicable. It might do injustice to the plaintiff, if her covenants could thus be set off and bar a recovery. The defendant holds the plaintiff's notes of hand secured by her mortgage. Various cases might be readily supposed where such a defence ought not to prevail, — as in cases of large payments advanced towards the purchase-money, and a mortgage to secure only a small residue, and that, by the terms of the contract, to be paid at some remote future day. There is no necessity for permitting this defence with a view of protecting the rights of the defendant in reference to his counter-demands. The entry of judgment may be postponed, if the case requires it, to await a set-off, after the defendant shall have perfected a judgment on his claims. This seems to us a more proper mode than to allow the claims of the defendant, as covenantee under the mortgage deed, to defeat the present action."

5. *Assignees and Licensees of Patents.*

The assignee of a patent, who has acted under it, and received profits from the sale of the patented article, will not be permitted to deny the validity of the patent in an action by the patentee to obtain an account.[1] In the case cited, the court say that the defendants, under an agreement for the manufacture and sale of the patented article, "having actually received profits from sales of the patented machine, which profits the defendants do not show have been or are in any way liable to be affected by the invalidity of the patent, its validity is immaterial. Moreover," the court proceed to say, "we think the defendants are estopped from alleging that invalidity. They have made and sold these machines under the complainant's title, and for his account; and they can no more be allowed to deny that title and retain the profits to their own use than an agent who has collected a debt for his principal can insist on keeping the money upon an allegation that the debt was not justly due. The invalidity of the patent does not render the sales of the machine illegal, so as to taint with illegality the obligation of the defendants to account. Even when money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect

[1] Kinsman *v.* Parkhurst, 18 How. 289.

himself from accounting for what was so received by setting up the illegality of the transaction in which it was paid to him. Thus, when a vessel engaged in an illegal trade carried freight which came into the hands of one of the part owners, and on a bill filed by the other part owner for an account, the defendant relied on the illegality of the trade, but it was held to be no defence.[1] So in Tenant *v.* Elliot,[2] the defendant, an insurance broker, having effected an illegal insurance for the plaintiff, and received the amount of a loss, endeavored to defend against the claim of his principal by showing the illegality of the insurance, but the plaintiff recovered."[3]

The question whether a licensee of a void patent may set up want of consideration in an action on the notes given for the use of the patent, arose in the recent case of Saxton *v.* Dodge.[4] The point was argued on the ground of estoppel.

The reply of the court, by Mr. Justice Johnson, was this: "The defendants are not estopped from setting up this defence against these notes. It appears from the answer that the note in question was given for the amount claimed to be due, under and by virtue of a certain contract between the defendants and the payees of the note. The said payees claimed to have a patent which gave them the exclusive right to make and vend reapers and mowers, with certain specified improvements, and gave a license to the defendants to make and vend such reapers and mowers, and also to sell territory for a certain specified consideration called license fees, which the defendants agreed to pay. The note was given for these fees. The defence is that this patent was void, and conferred no exclusive right whatever upon the payees of the note. So far as the question of estoppel is concerned, the case stands upon the same footing that it would had the action been to recover the fees. If the payees of the note had no such exclusive right, the defendants acquired nothing by the license. They merely obtained a license to do what they had the same right to do without any license. The license conferred no right, for the licensors had none to confer. I do not see, therefore, why the defendants may not set up this want of consideration in this case as well as in any other arising upon contract. It is not like the case of a landlord

[1] Sharp *v.* Taylor, 2 Phil. Ch. 801.
[2] 1 Bos. & P. 3.
[3] See also McBlair *v.* Gibbes, 17 How. 232, 236; McMicken *v.* Perin, 18 How. 507.
[4] 57 Barb. 84 (1870).

and tenant, where the latter gets possession of premises, and has the benefit of the use and occupation, and the rents and profits. Here the defendants received nothing visible or tangible. They obtained only a pretended exclusive privilege which the licensors did not own or possess, and could bestow upon no one. . . . . The true rule, I think, is that when a party gets nothing by the contract sought to be enforced against him, — neither title nor possession of property, — he is not estopped from setting up his defence.[1] . . . . It would be quite absurd to hold that an estoppel could be predicated upon a *nudum pactum*."

6. *Executors and Administrators.*

In a recent case[2] the question was raised, whether an administrator who finds property among the assets of the estate, takes possession of it as the property of the estate, and sells it, having no claim to it himself, and no other person making claim to it, can relieve himself from liability to the estate by setting up a claim adverse to the estate. The answer was that he would be estopped to make such a claim.

The doctrine upon which the decision was based was, that a trustee, who receives property as assets of the trust, cannot resist his liability on the ground of an adverse title which has never been asserted against him. The court remarked that it might be that a trustee would not be estopped from setting up his own title by the acceptance of a trust in ignorance of his title, or through mistake, when he had done no act which it would be prejudicial to the beneficiaries for him to gainsay.[3] And so, perhaps, a trustee, notified of an adverse claim, would not be required to surrender the assets until that claim was settled. But these principles did not touch the point in the present case. The administrator did not pretend to have any right to the cotton, or that anybody else was claiming it. The case was an open and undisguised attempt by a trustee to avail himself of his trust to make a personal profit out of an implied defect in the title to the property which had come to his hands. It was to the credit of the law that it did not tolerate such a thing.[4]

[1] See Hayne *v.* Maltby, 3 T. R. 438; Bliss *v.* Negus, 8 Mass. 46; Dickinson *v.* Hall, 14 Pick. 217; *ante*, pp. 297, 298.

[2] Irby *v.* Kitchell, 42 Ala. 438 (1868).

[3] McWilliams *v.* Ramsay, 23 Ala. 813.

[4] In the case of McWilliams *v.* Ramsay, above cited, the court held that where an administrator returns chattels in his in-

ventory, as belonging to the estate, and hires them out, taking notes payable to himself, as administrator, he is not estopped thereby to amend his inventory and leave them out, if they do not in fact belong to the estate. But where an administrator, who was also guardian of the intestate's heirs, charged himself as administrator with a fund, and failed to credit himself with its payment to him as guardian, and, in an attempted settlement of his account as guardian, refrained from charging himself therein with the fund, it was held in an action on his bond, as administrator, for the recovery of the fund, that he was estopped to deny that he held the fund as administrator. Wilson *v.* Wilson, 17 Ohio St. 150.

CHAPTER XVI.

COMMERCIAL PAPER.

UNDER this head we propose to consider, *first*, the warranty of genuineness implied by the acceptance and the indorsement of a bill of exchange or a promissory note; *secondly*, the warranty of capacity implied in the acceptance of a bill, or the making of a note; *thirdly*, the certification of checks; and, *fourthly*, the case of a transfer by an indorser after his liability has been fixed.

1. *Warranty of Genuineness.*[1]

The acceptance and the indorsement of commercial paper gives rise to a *kind of* estoppel[2] which is neither to be classed under the cases presented in the preceding chapter, nor with those to be presented in the chapter on Estoppel by Conduct. The doctrine, stated in general terms, is this, — that the acceptance of a bill and the indorsement of a bill or note are a conclusive admission that the signature of the drawer in the one case, and of all the prior parties in the other, is genuine.

The doctrine is not a branch of that presented in the preceding chapter, for there is wanting the relation of trust which connected the cases there considered. It does not belong to the chapter on Estoppel by Conduct, for there is here no extraneous representation — no representation beyond that necessarily involved in the very transaction — by which that chapter will be separated from the rest.

But the parties here, as in the preceding chapter, are equally innocent, and the subject is therefore allied to and co-ordinate with that from which we have just passed.

The leading case upon the effect of accepting a bill of exchange

[1] See Redfield & Bigelow's L. C. 59 – 63, and 643 – 670.

[2] We have some hesitation about placing the acceptor's warranty of the genuineness of the signature of the drawer, and kindred doctrines, upon the ground of estoppel; but there seems to be so much of the nature of an estoppel in many of the cases, and so strong a tendency among the later ones and text-writers to rest the rulings upon the principles of estoppel, that we do not feel free to omit the subject.

is Price *v.* Neal.[1] This was an action on the case by Price to recover from Neal the amount paid him on two bills of exchange, of which Price was drawee. One of the bills had been paid by Price without acceptance; the other was duly accepted and paid at maturity. Both bills had been forged. It was held that the action could not be maintained.

Lord Mansfield said: "Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him *was the drawer's hand*, before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it.[2] Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then finds out that they were forged; and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant."[3]

That the doctrine of warranty applies to an indorser also appears from the case of the State Bank *v.* Fearing.[4] This was an action of *assumpsit* on a promissory note made by Charles Brown, payable to Thomas Jackson, Jr., and indorsed with the name of the payee and of the defendant. It was agreed that the signatures of Brown, the maker, and of the defendant, the second indorser, were genuine, and that it could be proved, if the evidence were

[1] 3 Burr. 1354.

[2] But where, by usage or agreement, such duty is devolved upon the holder, it is held that the case will be different. Ellis *v.* Ohio Life Ins. Co, 4 Ohio St. 628. The point will be more fully noticed, *post*, pp. 437 *et seq.*

[3] *A fortiori*, one who admits that an acceptance is in his own handwriting, and thereby induces another to take the bill, is estopped to deny the genuineness of the acceptance. Leach *v.* Buchanan, 4 Esp. 226.

[4] 16 Pick. 533.

admissible, that the indorsement of the name of Jackson, the payee, was forged; that the note was presented by Brown to the plaintiffs for discount, in the usual course of business, and discounted by them for him; that both parties were ignorant of the forgery at the time; and that due notice was given of the non-payment of the note. The court held the evidence inadmissible.

Chief Justice Shaw, who delivered the opinion of the court, said: "In general, it is not necessary for the holder to prove the signature of any party prior to the party whom he sues. The reason seems to be obvious that the party defendant, by his indorsement, has admitted the ability and the signature of all prior parties. . . . . The effect of the engagement of the indorser is, that if the prior parties do not pay the note according to its tenor, upon due presentment, upon notice to him, he will. It is, therefore, a rule upon this subject, that the plaintiff is under no obligation to prove the signature of those prior to the party intended to be charged. It is very different where he claims against the acceptor of a bill or maker of a note. They respectively promise to pay to the payee or his order, and until he has made such order by his indorsement the plaintiff can establish no title, and to prove such order he must prove the genuineness of his signature."

This doctrine, that an acceptor or an indorser may not deny the genuineness of signatures previously written, is firmly established in the law.[1]

It will be noticed that the case of Price *v.* Neal, presented above, was an action to recover money paid by the drawee; and the question has arisen, whether the holder can enforce payment by the

[1] Hortsman *v.* Henshaw, Redfield & Bigelow's L. C. 57, and note; S. C. 11 How. 177; Coggill *v.* American Exchange Bank, 1 Comst. 113; Canal Bank *v.* Bank of Albany, 1 Hill, 287; Crichlow *v.* Parry, 2 Camp. 182; Story, Promissory Notes, § 380, and cases cited. In the section cited, Mr. Justice Story seems to rest the doctrine of the indorser's warranty upon grounds of estoppel. "This proceeds," he says, "upon the intelligible ground that every indorser undertakes that he possesses a clear title to the note, deduced from and through all the antecedent indorsers, and that he means to clothe the holder under him with all the rights which by law attach to a regular and genuine indorsement against himself and all the antecedent indorsers. *It is in this confidence that the holder takes the note*, without further explanation; and if each party is equally innocent, and one must suffer, it should be he who has misled the confidence of the other, and by his acts held out to the holder that all the indorsements are genuine and may be relied on as an indemnity in case of the dishonor thereof." In other places the learned writer speaks of the indorser's warranty as applying to *all* prior signatures. Promissory Notes, §§ 135, 387. See also Story, Bills of Exchange, §§ 111, 225, 412.

drawee after acceptance.[1] No direct answer was given in the case cited. But authority is not wanting upon the point, though most of the cases are cases of the misuse of blank acceptances and blank indorsements.[2] The principle, however, can hardly be different.

It is clearly held in these and other[3] cases, that one who intrusts his name to another on a blank piece of paper will not be permitted to allege, against an innocent holder, that it has been filled out with a sum larger than that agreed upon with the party to whom the blank signature was given.

The acceptor of a bill of exchange is not estopped to deny the genuineness of an indorsement, even of the payee's name, on the paper at the time of acceptance, if the indorsement was made after the paper had passed out of the drawer's hands; and money paid by the acceptor even to an innocent holder, under a forged indorsement, may be recovered if seasonable notice of the forgery be given.[4] Such a case was presented in Canal Bank *v.* Bank of Albany, just cited. The plaintiffs had paid to the defendants a draft drawn on them, payable to one Bentley, whose indorsement had been forged, and the defendants were innocent holders for value. The court held the plaintiffs entitled to recover the money.

"On the merits," said Cowen, J., for the court, "there was nothing in the nature of the transaction to conclude the plaintiffs against showing the forgery. They had done no act giving currency to the bill on the strength of Bentley's name. Even had they accepted it on the day when it was drawn, the defendants could have holden them concluded only in respect to the genuineness of the drawer's name, he being their immediate correspondent.[5] And the act of payment could amount to no more.[6] Neither

[1] Levy *v.* Bank of United States, 1 Binn. 27.

[2] Mather *v.* Maidstone, 18 Com. B. 273; Russell *v.* Langstaffe, 2 Doug. 514; Collis *v.* Emett, 1 H. Black. 313; Schultz *v.* Astley, 2 Bing. N. C. 544; Mountague *v.* Perkins, 17 Jur. 557; S. C. 22 Eng. L. & E. 516; Cruchly *v.* Clarence, 2 Maule & S. 90; Violett *v.* Patten, 5 Cranch, 151; Mitchell *v.* Culver, 7 Cowen, 336; Mechanics & F. Bank *v.* Schuyler, Ib., notes; Van Duzen *v.* Howe, 21 N. Y. 531; Ward *v.* Allen, 2 Met. 53; Putnam *v.* Sullivan, 4 Mass. 45.

[3] See Griggs *v.* Howe, 31 Barb. 100; Young *v.* Ward, 21 Ill. 223. See Belknap *v.* National Bank of North America, 100 Mass. 376.

[4] Canal Bank *v.* Bank of Albany, 1 Hill, 287; S. C. Redfield & Bigelow's L. C. 643; Hortsman *v.* Henshaw, 11 How. 177; S. C. Redfield & Bigelow's L. C. 57; Beeman *v.* Duck, 11 Mees. & W. 251. See also *ante*, p. 429.

[5] Chitty, Bills, 336, 7th Am. ed.

[6] Ibid.

acceptance nor payment, at any time nor under any circumstances,[1] is an admission that the first or any other indorser's name is genuine.[2] In point of title, then, the case of the defendants was the same as if the name of Bentley had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money on the mistaken belief, thus induced, that the name was genuine."

A different rule, however, prevails if the drawer of a bill put it into circulation with the name of the payee indorsed.[3] Hortsman *v.* Henshaw was such a case. Fiske and Bradford, a firm in Boston, drew their bill of exchange on Hortsman of London, payable to Fiske and Bridge. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, for negotiation; and it was sold to the defendants, *bona fide*, and for full value. They transmitted it to London, where it was presented, accepted, and paid at maturity. It turned out that the indorsement of the payee's name was forged; whereupon the present action was brought to recover the money paid. And the court held the plaintiff entitled to recover.

Taney, C. J., who delivered the opinion, said: "The general rule undoubtedly is, that the drawee, by accepting the bill, admits the handwriting of the drawer, but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

"The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill; and the holder, therefore, has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee

[1] This must be taken with some caution. See Hortsman *v.* Henshaw, *infra*.

[2] Chitty, Bills, 628, 7th Am. ed.

[3] Hortsman *v.* Henshaw, 11 How. 177; Ford *v.* Meacham, 3 Hill (S. Car.), 227; Burgess *v.* Northern Bank of Ky., 4 Bush. 600; Coggill *v.* American Exchange Bank, 1 Comst. 113. See Redfield & Bigelow's L. C. 57–63.

pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

"But in this case the bill was put in circulation by the drawers with the names of the payees indorsed upon it. And by doing so, they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

"Now the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him by the holder. The rights of the parties are, therefore, to be determined as if this bill was paid by Hortsman out of the money of Fiske and Bradford in his hands. And as Fiske and Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received.

"We take the rule to be this: Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot, upon that ground, defend himself against a *bona fide* indorsee. The insolvency of the drawer[1] can make no difference in the rights and legal liabilities of the parties."

A similar question arose in 1847 in Coggill *v.* American Exchange Bank.[2] In that case one of the drawers of the bill forged the payee's name, and then procured it to be discounted; and at maturity the plaintiff, the drawee, paid it. On discovering the forgery he sued the defendant, a *bona fide* holder, to whom he had paid the bill, to recover the sum paid. The court held that the action could not be maintained, but based their decision on the

[1] Which was the case here.

[2] 1 Comst. 113. We borrow this paragraph and the next substantially from our note to Hortsman *v.* Henshaw, Redfield & Bigelow's L. C. 57, 61.

fact stated in the report, that the payee had no interest in the bill, comparing it to a bill drawn to a fictitious person, such a bill being in effect payable to bearer.[1] The point made in Hortsman *v.* Henshaw was not noticed, — that, in such case, the drawer is estopped to deny the genuineness of the indorsement; that he is thus liable to the *bona fide* holder; and that, therefore, the drawee is entitled, on payment, to a credit against the drawer. Whence it would follow that it is immaterial that the payee had no interest in the bill, when the drawer himself puts it into circulation bearing the payee's indorsement. But according to Coggill *v.* American Exchange Bank, explaining on this point Canal Bank *v.* Bank of Albany,[2] if the payee *owned* the forged bill, the acceptor would be entitled to recover the sum paid to the holder. The two cases cannot be reconciled, unless the language of the court in Hortsman *v.* Henshaw is used with reference to the case of a payee having no interest in the bill. But that cannot be true; for how, then, could it be said that in such case the drawee has paid to one not entitled to receive the money? The case clearly covers the whole ground of a payee who owned the bill and of one who had no interest in it.

The cases further show that the drawer may deny the genuineness of the indorsement, if the forgery occurred after the bill passed out of the drawer's hands;[3] and this is the line of distinction drawn in Hortsman *v.* Henshaw. This may have escaped the notice of the learned judge[4] who delivered the opinion of the court in Coggill *v.* American Exchange Bank. It must be understood that these remarks are predicated entirely of forgery committed *before* the drawer put the bill into circulation.

The case of Beeman *v.* Duck[5] presents another phase of the doctrine of estoppel upon the acceptor of a bill. This was an action of *assumpsit* upon a bill of exchange drawn on the defendant by Bradshaw and Williams, an existing firm, payable to their order, accepted by the defendant, and indorsed by Bradshaw and Williams to the plaintiff. The drawing and indorsement (in the same handwriting) were forgeries. There was a plea traversing

[1] Cooper *v.* Meyer, 10 Barn. & C. 468; S. C. 5 Man. & R. 387; Vere *v.* Lewis, 3 T. R. 182; Minet *v.* Gibson, Ib. 481; S. C. 1 H. Black. 569; Collis *v.* Emmett, 1 H. Black. 313; Phillips *v.* Thurn, Law R., 1 C. P. 463; Plets *v.* Johnson, 3 Hill, 112.

[2] *Ante*, p. 430.

[3] Burchfield *v.* Moore, 3 El. & B. 683; Talbot *v.* Bank of Rochester, 1 Hill, 295; Young *v.* Grote, 4 Bing. 253.

[4] Mr. Justice Bronson.

[5] 11 Mees. & W. 251.

the drawing of the bill; but this fact was not brought to the notice of the court below, until the jury had given their verdict upon what had been regarded the principal point in dispute. The question now arose upon the validity of the plea referred to, in an application for a new trial.

"On the argument before us," said Mr. Baron Parke, "it was contended by the plaintiff's counsel that the drawing being a forgery, the defendant, by his acceptance, had undertaken to pay to any one who held the bill by an indorsement in the same handwriting, according to the principle laid down in Cooper *v.* Meyer;[1] and it was said there was evidence in the case that the signatures in drawing and indorsing were those of the same person. If this were so, the rule ought to be made absolute for a new trial, as the question as to the identity of the signature has not been submitted to the jury.

"But on the part of the defendant it is insisted that the case of Cooper *v.* Meyer is distinguishable from the present, for there the drawers were fictitious; here they really existed, though their signature was forged; and that in such case the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties, — a doctrine which is clearly established as to bills wherein the signature is not forged.[2] In analogy to that case, the defendant, it is said, admits, by his acceptance, that the bill was drawn in the name of Bradshaw and Williams, by themselves, or some agent authorized to draw in their name; but it does not admit that it was indorsed by themselves, or some agent authorized to indorse, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of Cooper *v.* Meyer."

The learned baron added that there was some doubt whether the bill should not have been declared upon as payable to bearer, according to Gibson *v.* Minet,[3] and Bennett *v.* Farnell,[4] which cases had not been cited, or this question raised, in Cooper *v.* Meyer.

[1] 10 Barn. & C. 468; S. C. 5 Man. & R. 387.

[2] Bobinson *v.* Yarrow, 7 Taunt. 455.

[3] 1 H. Black. 481.

[4] 1 Camp. 130, 180 c.

We have already intimated that the warranty, and therefore the estoppel, of the drawee, by acceptance or payment, extends only to the signature.[1] We must now present the important doctrine more fully. The point arose in Bank of Commerce *v.* Union Bank.[2] This was *assumpsit* to recover $ 1,005, paid by the plaintiffs upon a bill of exchange drawn upon them, payable to the order of J. Bonnet, and by him indorsed; after which it passed into the hands of the defendants' principal, *bona fide*, and for value. It appeared that the draft was originally drawn payable to the order of J. *Durand*, for one *hundred* and five dollars, and that afterwards the name "Durand" was altered to "Bonnet," and the word "hundred" to "thousand." And in this altered condition it had been paid by the plaintiffs to the defendants.

It was argued for the defendants that there was no rule that the banker must know the handwriting of his customer as to the signature, but that the rule was, that the banker should take care not to pay away his customer's money without sufficient authority for the purpose, and that it was the banker's duty to see that the bill was genuine in all respects. The attempt to establish the principle that a different degree of scrutiny was required in examining the body of the draft by the person on whom it was drawn, from that required in examining the signature of the drawer, was fallacious, and ought to be discountenanced. But the court held the plaintiffs entitled to recover.

"There is no ground," said Ruggles, J., speaking for the court, "for presuming the body of the bill to be in the drawer's handwriting, or in any handwriting known to the acceptor. In the present case, that part of the bill is in the handwriting of one of the clerks in the office of the Canal and Banking Company in New Orleans. The signature was in the name and handwriting of the cashier. The signature is genuine. The forgery was committed by altering the date, number, amount, and payee's name. No case goes the length of saying that the acceptor is presumed to know

[1] *Ante*, p. 427.

[2] 3 Comst. 230. We take pleasure in correcting a criticism on this case in our note to Hortsman *v.* Henshaw, Redfield & Bigelow's L. C. 62. See also Ib. 662. A further examination of Bank of Commerce *v.* Union Bank has revealed the fact, not referred to by the court, that the amount of the draft in controversy had been *written out*, instead of given in figures, as the head-note of the case indicates. There would, therefore, seem to have been no negligence in the drawer, as was the fact in Young *v.* Grote, 4 Bing. 253; and the decision is consequently correct.

the handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would be answerable for negligence in paying an altered bill, if the alteration were manifest on its face." [1]

There is another plain ground upon which this ruling may be based. The liability assumed by the drawer was to the extent of $105 only; and at the utmost, had there been no forgery of the payer's signature, the acceptor would not have been entitled to a credit of more than that amount in his account with the drawer by the payment of the bill. And this being so, he could have recovered, even in the case mentioned, the rest of the money paid.[2] This is on the hypothesis that the draft had been paid to the party to whom the drawer directed; but it was not so paid. It was paid to one not authorized to receive the money, and whose only claim was through a forgery. The acceptor, therefore, would be entitled to no credit against the drawer by payment, and hence would not have been bound to pay the bill at maturity. He was, then, clearly entitled to recover the sum as money paid under mistake.[3] The case presented is amply supported also by the authorities.[4]

If, however, the drawer of the bill has contributed, by his negligence, to the mistake of the drawee, the drawee, upon payment, will be entitled to credit the sum paid against the drawer;[5] and

[1] An acceptor is not estopped to show that the bill is a foreign one, contrary to its date. Steadman *v.* Duhamel, 1 Com. B. 888.

[2] Hortsman *v.* Henshaw, *ante*, p. 431.

[3] Ib. See Belknap *v.* National Bank of North America, 100 Mass. 376.

[4] National Park Bank *v.* Ninth National Bank, 55 Barb. 87; Worrall *v.* Gheen, 39 Penn. St. 388; Bruce *v.* Bruce, 5 Taunt. 495; Jones *v.* Ryde, Ib. 488; Hall *v.* Fuller, 5 Barn. & C. 750. See also Young *v.* Grote, 4 Bing. 253; Pagan *v.* Wylie, Ross, L. C. Bills & Notes, 194; Graham *v.* Gillespie, Ib. 195; Wilkinson *v.* Johnson, 3 Barn. & C. 428. But it is no defence to the acceptor of a bill that the date of it was altered by the drawer *before* acceptance, though done while the paper was in full force and effect. Langton *v.* Lazarus, 5 Mees. & W. 629. See Ward *v.* Allen, 2 Met. 53.

[5] Young *v.* Grote, 4 Bing. 253. In this case, the bill had been so drawn, by leaving a space after the mark "£," that the amount was changed from £52.2 to

he could not, therefore, recover from the holder of the paper the sum paid him.

Acceptance also conclusively admits the procuration to draw in the case of a bill drawn by procuration; but it does not admit a procuration to indorse, though the indorsement be by the same agent.[1] In Robinson *v.* Yarrow, cited in the note, Staeben & Co. authorized one Henry to draw on the defendant, which he did, *per proc.*, making the bill payable to the order of the drawers, by whom it was indorsed to the plaintiff, *per proc.* The defendant accepted the bill, and now resisted the payment. The question was, whether the plaintiff was bound to prove the procuration to indorse; and it was held he was.

"The mere acceptance," said Park, J., "proves the drawing, but it never proves the indorsement. It is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration; the first is a power to get funds into the agent's hands, the other to pay them out."

The effect of an acceptance for honor seems to be somewhat different. In Wilkinson *v.* Johnson,[2] the plaintiffs had accepted certain bills for the honor of certain *indorsers* (H. & Co.), and paid over the money to the defendants, who had been the holders of the bills. The fact was discovered on the same day that the bills were forgeries, the names of the indorsers, H. & Co., among others, not being genuine. Due notice of the fact was given; whereupon, the defendants having refused to repay the money, the present action of *assumpsit* was brought to recover the amount. And the action was sustained.

Abbott, C. J., in delivering judgment, said: "The plaintiffs were not drawers or acceptors of the bills, nor the agents of any supposed acceptors. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonor to the prior parties; which was accordingly given. The plaintiffs were called upon to pay for the honor of Heywood & Co., whose names appeared on the bills among other indorsers. The very act of calling upon them in this character was calculated in some de-

£352.2, and the drawer was required to bear the loss in his account with the drawee. See also Byles, Bills, 323; Chitty, Bills, 428.

[1] Robinson *v.* Yarrow, 7 Taunt. 455; Beeman *v.* Duck, 11 Mees. & W. 251.

[2] 3 Barn. & C. 428.

gree to lessen their attention. A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports on the part of the person making it that the name of a correspondent, for whose honor the payment is asked, is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties [is made], that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches. . . . . We think the payment in this case was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money."

The ground of this decision would seem, if correct, to be broad enough to cover the case of an acceptance for the honor of the drawer; and so it has been thought by Professor Parsons.[1] But in the late case of Phillips *v.* Thurn[2] the court entertained a different view;[3] though, singularly enough, Wilkinson *v.* Johnson, *supra*, was not before the court in either stage of the case. This

[1] 1 Notes & Bills, 323.

[2] 18 Com. B. N. S. 694; S. C. Law R. 1 Com. P. 463 (1866).

[3] See also Goddard *v.* Merchants' Bank, 4 Comst. 147; Story, Bills of Exchange, §§ 261, 262.

was an action by the holder of a bill accepted by the defendant *supra protest*, for the honor of the drawer, acceptance having been refused by the drawee. The question raised in the first aspect of the case [1] was upon the validity of a plea setting up the defence that the payee was a fictitious person, and that the defendant was ignorant of that fact at the time he accepted the bill. The plea was held bad. The case, on this point, does not seem to have been argued on the ground that the acceptor *supra protest* was bound to know the handwriting of the drawer, but rather that the acceptance had placed the defendant in the position of the drawer; and this was the ground taken by the judges. And as the drawer would be estopped to say that the payee was a fictitious person, the defendant was also estopped. "It seems to me," said Erle, C. J., "that there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think he is equally to admit that the bill is a valid bill."

If this doctrine is strictly accurate, and the acceptor *supra protest* stands precisely in the place of the drawer, there is much force in the argument of counsel for the defendant in the second aspect of the case.[2] "Canevero & Co. [the drawers] might have defended themselves," said they, "against any claim on this bill, on the ground that it was not drawn by them; and if they could deny their signature, why cannot the acceptor for their honor? . . . . The acceptor for honor ordinarily has a remedy over against the drawer; here the defendant could have none [on the bill?] against Canevero & Co."

The position is not precisely that of an acceptor either; for an acceptor for honor is, like an indorser, entitled to notice of non-payment. In fact, the relation of such a party to the bill seems anomalous, and *sui generis;* and this seems to be the view upon which Abbott, C. J., in Wilkinson *v.* Johnson, *supra*, held that an acceptor for the honor of an indorser was not precluded from denying the genuineness of the indorser's signature.

When Phillips *v.* Thurn came before the court the second time, it appeared that the drawee, having refused to accept, gave the person presenting the paper a letter to the plaintiffs, intimating that the defendant would probably accept the bill for the drawer's honor. The plaintiffs took the letter and bill to the defendant,

[1] 18 Com. B. N. S. 694. [2] Law R. 1 Com. P. 463.

and he, assuming it to be genuine, accepted it for the drawer's honor; and the plaintiffs thereupon discounted it. It turned out that the drawing and indorsements were forgeries. The court now held that the defendant was estopped from denying the genuineness of the bill, the plaintiff having been induced to part with their money on the faith of the acceptance.

Now the defendant, the acceptor for honor, could not be estopped to deny the genuineness of the drawing, it would seem, unless he had done something equivalent to a specific representation that the signature was genuine. It does not appear that this was done, unless the act itself of acceptance for honor had that effect. We shall notice this point presently.

So far as the matter of laches is concerned, it would seem that the defendant was less liable to the charge than the plaintiffs; for they went in person to him to see if he would accept for the drawer's honor, taking with them two letters, one from the drawee of the bills, the other from a person assuming to be the holder. In the first letter, which was addressed to the plaintiffs, the drawer said: "I have this day given your address to Mr. Henry Plana, the holder of two drafts on myself for £ 400 and £ 800, which I was prevented from accepting in consequence of having lately been under the painful necessity to suspend my payments. Messrs. J. C. im Thurn & Co. will intervene and accept on behalf of the drawers, Messrs. Canevero & Co., Lima (who themselves are safe for any amount); and as Mr. Plana is quite a stranger here, and might have some difficulty to get the bills discounted, I wished to render him some service. I therefore gave him your address, thinking that with Messrs. Thurn's signature you will not object to discount the bills for him." By the other letter Plana enclosed the drafts, and requested that the plaintiffs have them presented to the defendants, and that they then get them discounted.

This is a much stronger case than Wilkinson *v.* Johnson; and if the language of the chief justice in that case be correct, the case under consideration cannot be supported on this ground.

The question then recurs, May the defendant deny the genuineness of the drawer's signature? Several reasons occur to us pointing to the negative. *First*, though his position bears some resemblance to that of an indorser, who warrants the signatures of all prior parties, there is still an essential difference between the relations. The indorser has been a participant in the advantages of

the bill; he has received value from it; and he may well be estopped, after this, to deny his responsibility upon it, by saying that there is a forged signature prior to his own. Not so with an acceptor for honor; he has received no advantage from the bill; he assumes a risk merely as a favor. *Secondly*, his position differs from that of an accommodation acceptor in this, that the latter is usually a customer of the drawer, and acquainted with his handwriting, and the bill is generally drawn in the presence of the accommodation party; while an acceptor for honor may never have seen the drawer's handwriting, and would no doubt decline to give his acceptance if it was to be understood that he would be answerable for the genuineness of the signature. *Thirdly*, acceptance *supra protest* is not given for the purpose of negotiating the paper, or for the purpose of raising money; it is given, not for the benefit of the holder, but "for the honor" of the particular party. The object is merely to save the party from sudden and unexpected embarrassment and possible ruin; it is to give him time to relieve himself from the unlooked-for turn of events, caused by the failure of the drawee to accept, and to provide funds with which, through the acceptor for honor, to pay the bill, in case the drawee, upon presentation for payment, shall again dishonor the paper. The act may, and generally does, result in benefit to the holder, but this is not the motive.

Now the holder is perfectly aware of all this; and it is difficult to see how he could construe the act as a warranty of the genuineness of the drawer's signature. The only motive which could cause the acceptor for honor to warrant the drawing would be to aid the holder (for it could be of no advantage to the drawer); and he has no concern to do this. His sole interest is in his friend, the drawer.

It will be observed, from what has been said above, that the drawer of a bill cannot defend himself against the holder by alleging that the paper, as he drew it, is invalid; but this is the extent of the rule; and the language of Erle, C. J., in Phillips *v.* Thurn, that the drawer would have been estopped to deny the indorsement of the payee,[1] must be taken in connection with the case as then presented to the court, — of a fictitious payee. In such case, or, what is the same thing, when the payee is dead,[2] it is as if the paper had been made payable to bearer. On the other hand,

[1] 18 Com. B. N. S. 701.

[2] Ashpitel *v.* Bryan, 3 Best & S. 474.

if the bill is payable to a *real* party, the drawer is not estopped to deny the genuineness of *his* signature. He is a subsequent party to the drawer, and the holder must prove his title through him. The drawer undertakes, in case of dishonor by the drawee, to pay only to the payee, or to some one claiming title through him. However, it is held that even if the payee be a fictitious person, or dead, the acceptor's undertaking is to pay to an indorsement by the same hand ;[1] and if this is true, it would seem that the drawer could likewise insist upon the same thing, that is, that the payee's indorsement should be in his (the drawer's) hand. And the reason perhaps is, that this would be the best evidence that the paper had been properly negotiated.

The English cases all show that where there are prior parties to the paper entitled to remedies against antecedent parties, if the forgery is discovered too late to enable them to fix the liability of such parties, the acceptor will not be permitted to recover the sum paid to a *bona fide* holder.[2] In Mather *v.* Maidstone, just cited, the acceptor, instead of paying, had given a fresh acceptance after the maturity of a previous bill drawn on him, and purporting to have been accepted by him. A month after he discovered that the previous acceptance was a forgery; but the court held him estopped to allege the fact on the ground that the plaintiff, a *bona fide* indorser, had lost his remedy against the prior indorsers.

But a person is not bound as an acceptor of a bill bearing a forged acceptance by the mere fact that he has previously paid a bill similarly forged, if in fact he has not led the holder to believe that the acceptance of the bill sued upon was genuine.[3] But if it is made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of

[1] Cooper *v.* Meyer, 10 Barn. & C. 468; Ashpitel *v.* Bryan, 3 Best & S. 474; Byles, Bills, 184, 8th Eng. ed.

[2] Cocks *v.* Masterman, 9 Barn. & C. 902; Mather *v.* Maidstone, 18 Com. B. 273; Wilkinson *v.* Johnson, 3 Barn. & C. 428; Smith *v.* Mercer, 6 Taunt. 76. But it is said that the strict rule held in England respecting the time within which notice must be given does not prevail in America. Canal Bank *v.* Bank of Albany, 1 Hill, 287, 292. See 2 Parsons, Notes & Bills, 598, 599. But this seems doubtful. See Irving Bank *v.* Wetherald, 36 N. Y. 335; Merchants' National Bank *v.* National Eagle Bank, 101 Mass. 281; S. C. Redfield & Bigelow's L. C. 648. Goddard *v.* Merchants' Bank, 4 Comst. 147, certainly is not an authority for the proposition, for there was no prior party to be charged in that case. And the same may be said of Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628, 660.

[3] Morris *v.* Bethell, Law R. 5 C. P. 47.

the principal, then there would be "almost conclusive evidence" against the latter that the acceptance had been written by his authority.[1]

An exception is made to the rule that prevents a recovery of money paid by the acceptor of a forged draft, where the defendant becomes holder of the draft *before acceptance* by the plaintiff, and where the loss had already attached; the acceptor giving notice of the forgery immediately upon the discovery of it.[2]

"The defendant became the holder of the draft," said the court in the case first cited, "before it was accepted by the plaintiffs, and before they had any knowledge of its existence, and consequently before the defendant had any right of action against them for its recovery. The plaintiffs, therefore, had done no act which induced the defendant to believe the signature of the drawer to be genuine at the time the bill was purchased. How, then, can it be said that the defendant purchased the bill on the faith of the plaintiff's acceptance, or on their guaranty of the genuineness of the drawer's signature? Or how can it be said that the plaintiffs misled the defendant at the time of the purchase of the bill, or were then guilty of the omission of any duty toward the defendant, as the purchaser of the bill? If the defendant had purchased the bill on the faith of the acceptance of plaintiffs, or had sustained any loss in consequence of their negligence, we would have no difficulty in affirming the judgment of the lower court; but such are not the facts made known to us by the record."[3]

Another important rule is, that where a person receives from another paper purporting to be his (the receiver's) own paper, as

[1] Ib. Bovill, C. J.; Barbell *v.* Gingell, 3 Esp. 60; Crout *v.* DeWolf, 1 R. I. 393.

[2] McKleroy *v.* Southern Bank of Kentucky, 14 La. An. 458; S. C. Redfield & Bigelow's L. C. 662. See National Bank of North America *v.* Bangs, Supreme Court of Massachusetts, 1871.

[3] The court cited Chitty, Bills, 464, where the learned author says: "If he [the holder] thought fit to rely on the bare representation of the party from whom he took it [the bill], there is no reason why he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that, of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that these mere facts afford a distinction, and that upon attempting to reconcile them they are not as contradictory as might on first view have been supposed."

genuine, and passes the amount to the credit of such person, the party receiving cannot recover the amount so credited, by alleging that the paper was forged.[1] In the case cited, the Bank of Georgia having originally issued the paper in question, it was, in the course of circulation, fraudulently altered, and subsequently found its way into the Bank of the United States. The latter then presented it to the former, which received it as genuine, and placed it to the general account of the Bank of the United States as cash, by way of deposit. The forgery was discovered nineteen days afterwards, upon which notice was given, and a tender of the paper made to the Bank of the United States, and refused. Both parties were equally innocent, and it was not disputed that the Bank of the United States were *bona fide* holders, for value. The Bank of Georgia now sued to recover the amount of the deposit. But the court held that the action could not be maintained.

"The modern authorities," observed Mr. Justice Story, in delivering judgment, "certainly do in a strong manner assert that a payment received in forged paper, or in any base coin, is not good; and that if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand. . . . . But, without entering upon any examination of this doctrine, it is sufficient to say that the present is not such a case. The notes in question were not the notes of another bank, or the security of a third person, but they were received and adopted by the bank as its own genuine notes, in the most absolute and unconditional manner. They were treated as cash, and carried to the credit of the plaintiff in the same manner, and with the same general intent, as if they had been genuine notes or coin."

The learned judge having first considered the case in the light of a payment of money which could not be recovered, proceeded to say: "But if the present case is to be considered, as the defendant's counsel is most solicitous to consider it, not as a case where the notes have been paid, but as a case of credit, as cash, upon the receipt of them, it will not help the argument. In that point of view, the notes must be deemed to have been accepted by the defendants as genuine notes, and payment to have been promised accordingly. Credit was given for them, as cash, by the defend-

[1] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333; S. C. Bedfield & Bigelow's L. C. 650. See Oddie *v.* National City Bank, 45 N. Y. 735, 742.

ants for nineteen days, and, during all this period, no right could exist in the plaintiffs to recover the amount against any other person from whom they were received. By such delay, according to the doctrine of Lord Chief Justice Gibbs in Smith *v.* Mercer,[1] the prior holders would be discharged; and the case of the Gloucester Bank *v.* the Salem Bank[2] adopts the same principle; so that there would be a loss produced by the negligence of the defendants. But, waiving this narrower ground, we think the case may be justly placed upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptances of forged drafts. If there be any difference between them, the principle is stronger here than there; for there the acceptor is presumed to know the drawer's signature. Here, *a fortiori*, the maker must be presumed, and is bound, to know his own notes."

The Ohio court have gone still farther, and held that even in the case of payment to an innocent indorser the acceptor may recover the money, if it appear that by the settled course of business between the parties, or by a general custom of the place, the holder takes upon himself the duty of exercising some material precaution to prevent the loss, and fails to perform that duty.[3]

The question arose in MacGregor *v.* Rhodes[4] whether an indorser could deny the indorsement to himself; and it was held he could not. "The declaration alleges," said Campbell, C. J., "that Pinkney drew a bill payable to his order, and indorsed it to the defendants, and that the defendant indorsed it to the plaintiff, and that it was presented and dishonored. The plea admits all these allegations, except the allegation of the indorsement by Pinkney to the defendants. Are the defendants, who admit that they indorsed to the plaintiff, at liberty to deny that Pinkney indorsed to them? The issue would be idle. Whether Pinkney indorsed to the defendants in blank or specially, the fact of the indorsement by the defendants would at the trial be conclusive evidence of Pinkney's indorsement to them, and would estop them from showing what purported to be Pinkney's indorsement was a forgery. The request is to pay to the order of the payee. When a man indorses such a bill he undertakes that, if the party

[1] 6 Taunt. 76.
[2] 17 Mass. 33.
[3] Ellis *v.* Ohio Life Ins. Co., 4 Ohio St. 628.
[4] 6 El. & B. 266.

requested do not pay, he will; and he cannot deny that the payee has made the order."

It has been held that a person selling commercial paper without indorsing it does not warrant the genuineness of the paper.[1] In the case cited the court drew a distinction between such a case and that where the paper was given in payment of a debt, or of goods then purchased, or by way of discount for money then loaned. In such case if the paper turn out to be a forgery, the debt or loan may be recovered.

But this doctrine has been vigorously criticised;[2] and it is doubtful if it can be regarded as good law. The contrary is held in England.[3] In the case last cited, — an action to recover money paid a bill-broker, on a forged acceptance, — Lord Campbell, C. J., said: "The verdict of the jury finds that, in cases of this sort, in London, where a bill-broker takes a bill to a capitalist and gets it discounted, the transaction is between the capitalist and the bill-broker, and not between the capitalist and the bill-broker's customer. . . . . There is, in practice, one advice note or discount ticket made out between the capitalist and the bill-broker, and another made out between the bill-broker and the customer. The rates of interest at which the bill is discounted are different, and bear no fixed relation to each other; and it is quite immaterial to the customer whether the bill-broker takes the bill because he has got funds of his own which he is willing to invest in discounting it, or because he has found a capitalist willing to discount it on terms that will leave him a profit. In this case, the fact that there were distinct and separate contracts, one between the plaintiffs and the defendants, and the other between the defendants and Anderson, seems to me established most clearly. . . . . I am of opinion that though the defendants, by not indorsing or guaranteeing the bill, preserved themselves from warranting the solvency of any of the parties, yet they did undertake that the instrument was what it purported to be. It is not disputed that in fact the discount of their bill by the plaintiffs was solely on the faith of its being an acceptance of P. and C. Van Notten, which it was not; and in consequence of its

[1] Baxter *v.* Duren, 29 Maine, 434.

[2] Rieman *v.* Fisher, 4 Am. Law Reg. 433; Story, Promissory Notes, § 118; Bell *v.* Cafferty, 21 Ind. 411. See also Cabot Bank *v.* Morton, 4 Gray, 156; Merriam *v.* Wolcott, 3 Allen, 258; Redfield & Bigelow's L. C. 669.

[3] Gurney *v.* Womersley, 4 El. & B. 133.

being so, it was valueless. The possibility of recourse against the estate of Anderson, a convict and a bankrupt, did not prevent there being a total failure of consideration."

Mr. Justice Coleridge said: "The vendor of a specific chattel, it is not disputed, is responsible if the article be not a genuine article of that kind of which the seller represents it to be. And the question really raised is, What is the extent of the want of genuineness for which he is responsible? Without laying down the limits, it is clear to me that this case fell much within them. In effect, here the defendants said to the plaintiffs, Will you take, without recourse to us, this bill, which purports to bear the acceptance of P. and C. Van Notten? By doing so they represented it to be their acceptance, as it purported to be, and sold it as answering that description. That being so, the case is not so strong as the bar of brass sold as a bar of gold mentioned in Gompertz *v.* Bartlett,[1] or of the altered navy bill in Jones *v.* Ryde."[2]

2. *Warranty of Capacity.*

The execution of a negotiable note is a warranty of the capacity of the payee to indorse the paper.[3] The case cited was an action of *assumpsit* by the indorsee of a promissory note against the maker, to which the defendant pleaded that the payee had become a bankrupt, and that his property had passed to assignees, whereby the right to indorse the note had become vested in them, so that his indorsement of the paper was void. But this was held an inadmissible defence, though the jury found that the indorsement had been made without the consent of the assignees.

Abbott, C. J., took the ground, that, as it did not appear that the assignees had interfered, or made any claim, the payee had a right to indorse. But the true ground, it would seem, was stated by Bayley, J. "This is an action," said he, "upon a note payable to Clarke, or to the order of Clarke. The defendant, therefore, by making such note, intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defence now set up is, that although he has issued a security to the world, importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applica-

[1] 2 El. & B. 849, 854.
[2] 5 Taunt. 488.
[3] Drayton *v.* Dale, 2 Barn. & C. 293.

ble to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world that the other has such power."[1]

The learned judge then cites the case of Taylor *v.* Croker,[2] showing that the same principle applies in acceptance. In this case, a bill was drawn by infants. The defendants accepted the bill, and the infants indorsed it. Lord Ellenborough held that as the defendants had, by their acceptance, admitted the competency of the infants to indorse, they should not now be permitted to say that they were incompetent.[3]

So, too, the acceptor of a bill is estopped to say that the drawer and payee was a married woman.[4] "In support of a contrary doctrine," said Wilde, C. J., in delivering judgment in the case cited, the cases of Connor *v.* Martin,[5] Barlow *v.* Bishop,[6] and Prince *v.* Brunatte,[7] were cited, on the argument, by the counsel for the defendant. In Connor *v.* Martin, as reported in Strange, the plaintiff declared on a note made to a *femme covert*, and indorsed by her to him; and, on argument, judgment was given for the defendant,— the right being in point of law in the husband, and the wife having no power to dispose of it. But this case was cited by Dennison, J.,[8] from a note taken by himself in court; and it appears from that learned judge's statement, that the promissory note in question had been given to the wife *before marriage*. Barlow *v.* Bishop is certainly a direct authority for the position, that, if a note is drawn, payable to a woman or order, and her indorsee sues the maker, he may set up as a defence that she was a married woman, though he knew her to be such at the time he made the note. But it was observed by Lord Abinger in Pitt *v.* Chappelow,[9] that, in Barlow *v.* Bishop, the plaintiff must be taken to have known the fact of the husband's property in the bill, and therefore could not take an assignment of it from the wife. Indeed, it appears from the report of the case at *nisi prius*, in Espinasse,[10] that the wife had given a previous note for the money in her own name, and that the note in question was given in con-

[1] The same ground, substantially, was taken by Holroyd, J.
[2] 4 Esp. 187.
[3] See Jones *v.* Darch, 4 Price, 300.
[4] Smith *v.* Marsack, 6 Com. B. 486.
[5] 1 Strange, 516.
[6] 1 East, 432.
[7] 1 Bing. N. C. 435; S. C. 1 Scott, 342.
[8] Rawlinson *v.* Stone, 3 Wils. 1, 5.
[9] 8 Mees. & W. 616.
[10] 3 Esp. 266.

sequence of such former note not being negotiable, which appears to favor Lord Abinger's supposition, that the plaintiff must have known of her coverture before the note was indorsed to him. In Prince *v.* Brunatte,[1] it was certainly assumed by the court, as well as by the counsel on both sides, that such a plea as the present would be a good answer to the action; and the same observation arises with respect to the case of Cotes *v.* Davies,[2] and that of Prestwick *v.* Marshall.[3] But in none of these cases does it appear that the point now under consideration was ever made, viz., that the case falls within the general principle — which is stated by Bayley, J., in his judgment in Drayton *v.* Dale,[4] as applicable to all negotiable securities — that a person shall not dispute the power of another to indorse an instrument when he asserts, by the instrument, that the other has such power. And we can discover no reason why this principle should not be applicable; and if it is, it appears to us to govern the present case, and to prove that the plea in question is bad. It need scarcely be added that, in so deciding, we do not mean at all to impugn the proposition that, if a bill or note is made payable to the order of a married woman, the property in it will pass by the indorsement of the husband, or he may sue on it, either joining his wife as a party to the action, or in his own name, at his option. And, consequently, it cannot be denied that the defendant may possibly be compelled to pay the bill in question twice. But this is a consequence which follows from his own act of accrediting the capacity of a woman to indorse, by accepting a bill payable to her order, who in truth was incapable."

In the case already cited,[5] it was held by Lord Abinger, with some apparent hesitation, that the estoppel arose even though the drawer was a bankrupt before the bill was executed; and the doctrine has been confirmed in the Queen's Bench, so that no doubt can now exist upon the point.[6] In this case — *assumpsit* by a *bona fide* indorsee against the acceptor of a bill — the defendant pleaded that he was an uncertificated bankrupt before the acceptance was given. But the court, on demurrer, held him estopped.

[1] The reporter calls attention to the fact that the point argued in this case was upon the sufficiency of the replication, and that the validity of the plea appears to have undergone very little consideration.

[2] 1 Camp. 485.

[3] 7 Bing. 565; S. C. 5 Moore & P. 513.

[4] *Ante*, p. 447.

[5] Pitt *v.* Chappelow, 8 Mees. & W. 616.

[6] Braithwaite *v.* Gardiner, 8 Q. B. 473.

Lord Denman, C. J., observed: "Lord Abinger was a high authority on subjects of this kind. It is clear what his opinion was on the point of estoppel in Pitt *v.* Chappelow,[1] and I think it rests on sound principles. In this case, all parties knowing the bankrupt's situation, the defendant accepts a bill drawn by him. He thereby admits that the bankrupt had power to draw upon him; and, therefore, on a short and simple ground, — which is always the best, — I am of opinion that the plaintiff has a right to maintain the action."[2]

The same ruling was again made by Parke, B., in Hallifax *v.* Lyle.[3] This was an action on a bill of exchange, against the acceptors, who pleaded that the drawers (who were also payees and indorsers) were a body corporate, having no authority to draw, indorse, issue, or negotiate bills of exchange. But the plea was held bad on demurrer.[4]

The American cases upon this subject of the warranty of capacity seem to be in accord with the English decisions.[5]

But it has been held that if the payee be an insane person, this will be a valid defence to the maker of a note, in an action by a *bona fide* indorsee.[6]

In the case first cited, the payee became insane *after* the execution of the note; and this, it would seem, should be the ground upon which to rest the decision. The maker or acceptor only warrants the capacity of the payee to indorse *at the time the paper was executed*,[7] and not for all future time. An indorsement by a payee who has, after the making or acceptance, lost his reason, would seem to be as ineffectual to carry out the purpose of the paper as a forged indorsement of the payee's name; and we have seen that there is no warranty of genuineness in such case.

In the Massachusetts case cited, however, it was held that evidence of the insanity of the payee, at the time the note was exe-

[1] 8 Mees. & W. 616.

[2] Kitchen *v.* Bartsch, 7 East, 53, was distinguished on the ground that there the drawer, who was the bankrupt, himself brought the action. Wightman, J., said that the answer which availed against him as a plaintiff could not serve an acceptor who, of his own authority, had made the bill of the bankrupt negotiable, and was sued upon it by a *bona fide* holder.

[3] 3 Ex. 446.

[4] Sanderson *v.* Collman, 4 Man. & G. 209, was distinguished.

[5] See Nightingale *v.* Withington, 15 Mass. 272; Burrill *v.* Smith, 7 Pick. 291; Hardy *v.* Waters, 38 Maine, 450.

[6] Burke *v.* Allen, 29 N. H. 106. Peaslee *v.* Robbins, 3 Met. 164.

[7] Byles, Bills, 193; Smith *v.* Marsack, 6 Com. B. 486, 501, *ante*, p. 448, explaining Connor *v.* Martin, 1 Strange, 516.

cuted, was admissible. The decision is, therefore, in direct conflict with that of Wilde, C. J., in Smith *v.* Marsack, above presented. It will be remembered that the learned chief justice distinguished the case of Connor *v.* Martin, in the fact that the note in that case was given to the woman *before marriage.* The language of the eminent writer on bills and notes, Mr. Justice Byles, is also that the acceptor and maker admit "the *then* capacity of the payee, to whose order the bill or note is payable, to indorse."[1] It seems difficult, therefore, to sustain the Massachusetts decision. It is worthy of note, also, that no authorities appear to have been before the court.

Indorsement implies a warranty of the capacity of all prior parties; and this is not affected by the fact that the indorsee may know that one of the prior parties is in fact incompetent.[2] The case cited was an action by the indorsee of a note against an indorser. The note had been executed by two married women, of which fact the plaintiff had been aware when he took the paper. The incapacity of the makers to contract was now alleged in defence by the indorser; but judgment was given for the plaintiff.

So, too, the guarantor of a bond will be estopped to deny the competency of the makers of it.[3]

3. *Certification of Checks.*

The certification of checks, and the like cases, bear a close analogy to those above considered. The question of estoppel arises where the teller or cashier of a bank certifies verbally or in writing[4] that a check or draft drawn upon the bank, or a note payable at the bank, is "good," and the party presenting the paper, relying upon the certification, has been led to change his position or course of action.

In the case of Irving Bank *v.* Wetherald,[5] the mistake in the state of funds of the party whose note was certified as good was discovered on the very day when the certificate was given, and immediate notice was given to the presenting bank, and proper steps taken to charge the defendants, who were indorsers. The action was by the certifying bank, which had become the holder, against the indorsers.

[1] Byles, Bills, 193. So also 1 Parsons, Notes & Bills, 321.

[2] Erwin *v.* Downs, 15 N. Y. 575.

[3] Remsen *v.* Graves, 41 N. Y. 471.

[4] Irving Bank *v.* Wetherald, 36 N. Y. 335.

[5] *Supra.*

In delivering judgment in this case, Hunt, J., said: "Both the judge at the circuit and the general term were of the opinion that the notice by the plaintiffs to the Seventh Ward Bank [which had presented the paper] of the mistake in certifying Wilson's check to be good, before any steps had been taken or any measures omitted by the Seventh Ward Bank, and while there was still time to fix all the parties upon the note, relieved the plaintiffs from their liability on the certificate. In this opinion I concur. Such a certificate possesses no extraordinary or hidden power. It would impose no greater liability than its terms fairly require. . . . . The correctness of this certificate is a matter which the certifying bank has the means of knowing, and is bound to state correctly. If the presenting bank relies upon its accuracy, and fails to charge the indorsers, as upon non-payment on presentation, the certifying bank is estopped from denying the truth of its statement. Having asserted, of its own knowledge, that the maker has funds in its bank to meet the note, and the presenting bank having omitted to charge its indorsers in reliance upon such statement, the certifying bank will not be permitted to go behind its own statements. The teller of the bank is the proper officer to make this statement, and his statement binds the bank, whether accurate or erroneous.[1]

"In the present case the Irving Bank discovered its error in stating that it had funds for the payment of Wilson's note in sufficient time to prevent any loss in consequence of the error. It immediately notified the Seventh Ward Bank of the error, and in time to enable it to make a presentment, if necessary, and to charge the indorsers. No damage, therefore, could accrue to the latter bank from the erroneous information. They were bound to accept and to act upon the corrected information, if there were time and opportunity so to do. I agree with the courts below that the plaintiffs might have stopped at that point, and there would have been no liability on their part to the Seventh Ward Bank."

It is not necessary to give the opinion further; the remainder of it was a consideration of the question whether there had been a payment of the paper by the plaintiffs' taking it up.

The question, it will be observed, depends partly upon the law of agency and partly upon the law of negotiable paper. Neither of

[1] Meads *v.* Merchants' Bank of Albany, 25 N. Y. 143; Farmers' & M. Bank *v.* Butchers' & D. Bank, 16 N. Y. 125.

these matters come within the proper scope of this work, in themselves; but a brief reference to them here seems necessary.

In Massachusetts, it has been held that the certification of checks is not within the inherent power of the office of teller, so as to bind the bank to pay the amount of it to any person who may become a *bona fide* holder.[1] But in New York it is held that a *bona fide* holder for value of a negotiable check certified to be good by the paying teller of the bank on which it is drawn, whose authority to certify is limited to cases where the bank has funds of the drawer to meet the check, can recover of the bank the amount of the check, though the drawer had no funds in the bank, and the certification by the teller was in violation of his duty.[2] And this decision has been followed in the Supreme Court of the United States in a very recent case,[3] which was argued by some of the most eminent counsel in the country.

In the New York case above referred to, Mr. Justice Selden, who delivered the opinion, having remarked that in the case of funds a certification by the teller would be proper, said: "But it is insisted that his power extended only to cases where the bank had funds in hand, he having been expressly prohibited from certifying in the absence of funds, and hence that the bank is not bound. It may be doubted whether such a prohibition adds anything to the restrictions which would otherwise exist upon the powers of the agent. A teller, acting under a general power to certify checks, would be guilty of an excess of authority, and a clear violation of duty, if he certified without funds.

"The powers of the cashier himself, or other principal financial officer of the bank, would no doubt be subject to the same limitation. To certify a check when the bank has no funds to meet it, is to make a false representation; and neither the incidental power of the cashier, nor a general power conferred upon any other officer, could be construed to authorize that. Hence, if a bank is holden, in any case, upon a certificate of its cashier that a check is good, when it has no funds of the drawer, it is not because the cashier is deemed authorized to make such a certificate, but because the

[1] Mussey *v.* Eagle Bank, 9 Met. 306; S. C. Redfield & Bigelow's L. C. 721.

[2] Farmers' & M. Bank *v.* Butchers' & D. Bank, 16 N. Y. 125; S. C. Redfield & Bigelow's L. C. 727.

[3] Merchants' National Bank *v.* State National Bank, 10 Wall. 604; S. C. Redfield & Bigelow's L. C. 739 (1870).

bank is bound by his representation, notwithstanding it is false and unauthorized.

"It would seem, therefore, that the defence insisted upon here would have been equally available if the checks in question had been certified by the cashier himself. It might then have been urged with truth that the cashier had violated his duty, and exceeded the proper limit of his powers, in making the certificate; and if the argument be sound, that the principal is in no case bound unless the act of the agent is within the powers either actually or apparently conferred upon him, the bank would not be holden in such a case. . . . .

"It will be seen that, if these views are correct, the present case does not turn in any degree upon the rules applicable to special agencies, but that the question would have been precisely the same if the check had been certified by the cashier or other principal financial officer of the bank. As they may, however, admit of doubt, I shall treat the case as one of an agency specially restricted, and shall simply inquire whether a *bona fide* holder, for value, of a negotiable check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds. . . . . The defence assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule, except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different. In Hern *v.* Nichols[1] the leading case on the subject, where an agent, authorized to sell a quantity of silk, had made certain fraudulent representations by which the purchaser was deceived, the principal was held liable. Lord Holt there said: 'Seeing somebody must be loser by this deceit, it is more reasonable that he that employs and *puts a confidence* in the deceiver should be a loser, than a stranger.' The principle of this case has never, I think, been overruled, but, on the contrary, has been repeatedly approved and confirmed. It will be found directly applicable to the present case. The certificate of the teller is a

[1] 1 Salk. 289.

positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss? The reasoning of Lord Holt, in the case of Hern *v.* Nichols, applies here with peculiar force. The bank selects its teller, and places him in a position of great responsibility. The trust and confidence thus reposed in him by the bank leads others to confide in his integrity. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, so far as is known and can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be held responsible? It is worthy of consideration that the fact misrepresented in this case is not only one peculiarly within the knowledge of the agent, but one with which he is made acquainted by means of the position in which he is placed by the bank, and which it is his especial province and duty to know, and which could scarcely be definitively ascertained except by application to him. These circumstances would seem to bring the case decidedly within the principles adopted in Hern *v.* Nichols, and in the subsequent decisions based upon that case.

"This conclusion is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprise him that the certificate was defective and unauthorized. To discover that, he must not only have notice of the limitations upon the powers of the teller, but of the extrinsic fact that the bank had no funds; and as to this extrinsic fact, which he cannot justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One who deals with an agent has no right to confide in the representation of the agent as to the extent of his powers. If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrin-

sic fact, whether the bank has funds or not, the case is different. That is a fact which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowing. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If, therefore, one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case.

"It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it. The familiar case of the giving of a negotiable partnership note, by one of the partners, for his own individual benefit, affords an apt illustration of this rule. Each of the partners is the agent of the partnership as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a *bona fide* holder, the firm is precluded from questioning the authority of the partner, and is effectually bound. The cases in this State, by which this doctrine is illustrated and established, are numerous and uniform.[1]

"It will be found difficult to distinguish these cases in principle from that now before the court. Every person taking the negotiable note or acceptance of a partnership, executed by one of the partners in the name of the firm, is bound to know the extent of

[1] Livington *v.* Hastie, 2 Caines, 246; Lansing *v.* Gaine, 2 Johns. 300; Laverty *v.* Burr, 1 Wend. 529; Williams *v.* Walbridge, 3 Wend. 415; Boyd *v.* Plumb, 7 Wend. 309; Gansvoort *v.* Williams, 14 Wend. 133; Joyce *v.* Williams, Ib. 141; Wilson *v.* Williams, Ib. 146; Catskill Bank *v.* Stall, 15 Wend. 364; S. C. 18 Wend. 466.

the partner's authority to bind the firm; but this obligation does not extend to the consideration for which the note or acceptance was given. If given for the private debt of one of the partners, or for the accommodation of third persons, all the cases agree that the burden of proving the holder's knowledge of that fact rests upon the partnership. That the execution is by an agent is as apparent upon the face of the paper in such cases as in that of a certified check; because a partnership can only act in its partnership name through agents. . . . .

"The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent from disputing facts which show that the act was authorized. There is no analogy between these partnership cases, or the case before the court, and cases where the paper is forged. The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge. The giving a note in the partnership name, by one of the partners, is a virtual representation that it is given in the partnership business, and, if negotiable, the representation is deemed in law to have been made to every subsequent *bona fide* holder of the note. The State of Illinois *v.* Delafield [1] is another illustration of the same principle. An agent of that State was authorized to dispose of certain bonds, but was not to sell them below par or on credit. He sold them to Delafield on time and at a sacrifice. The State filed a bill against Delafield for relief, and applied to the Court of Chancery for an injunction to restrain the defendant from negotiating the bonds, on the ground that, if negotiated, the State would be liable to pay them. The defendant's counsel insisted that if the bonds were void in the hands of Delafield, they would be equally so in the hands of any person to whom he might transfer them. The chancellor, nevertheless, granted the injunction, saying that, if the securities should pass into the hands of a *bona fide* holder, the State would be equitably and legally bound to pay them. On appeal to the Court for the Correction of Errors, the decision of the chancellor was affirmed by a nearly unanimous

[1] 8 Paige, 527; S. C., in error, 2 Hill, 159.

vote. It would be difficult, I think, to discover any valid distinction in principle between this case and the one we are considering. The purchaser of the bonds from Delafield would, equally with Delafield himself, be presumed to know the limits of the authority conferred upon the agent; but it must have been held that he would not be bound to inquire as to the extrinsic facts attending the sale or negotiation of the bonds." [1]

In the case referred to, decided by the Supreme Court of the United States,[2] the checks had been certified as good by the cashier of the bank. Mr. Justice Swayne, in delivering the judgment, observed that estoppel *in pais* presupposes an error or a fault, implying an act in itself invalid. The rule proceeded upon the consideration that the author of the misfortune should not himself escape the consequences, and cast the burden upon another.[3] The cashier had gone to the paying bank; and, upon the faith of his acts and declarations, the bank had parted with its money. The misfortune occurred through the cashier of the certifying bank, and the loss should fall upon that bank.

In a subsequent portion of his opinion, the learned judge said that by the law merchant of this country the certificate of the bank that the paper is good was equivalent to acceptance. It implied that the check was drawn upon sufficient funds in the hands of the drawee, that they had been set apart for its satisfaction, and that they should be so applied whenever the paper was presented for payment. It was an undertaking that the check was good then, and should continue good; and this agreement was as binding on the bank as its notes of circulation, or a certificate of deposit payable to the order of the depositor. The object of the certification was to enable the holder to raise money; the transferee took it with the same readiness and sense of security that he would have taken the notes of the bank; and it was available to him for all the purposes of money. The certifying bank intended these consequences, and it was liable accordingly.[4]

[1] See *post*, pp. 461 *et seq.*

[2] Merchants' National Bank *v.* State National Bank, 10 Wall. 604.

[3] Swan *v.* North British, &c. Co. 7 Hurl. & N. 603; Hern *v.* Nichols, 1 Salk. 289.

[4] The following authorities were cited in support of the ruling: Bickford *v.* First National Bank, 42 Ill 238; Willets *v.* Phœnix Bank, 2 Duer, 121; Barnet *v.* Smith, 30 N. H. 256; Farmers' & M. Bank *v.* Butchers' & D. Bank, 14 N. Y. 624; S. C. 16 N. Y. 125; Meads *v.* Merchants' Bank, 25 N. Y. 143; Brown *v.* Leckie, 43 Ill. 497; Girard Bank *v.* Bank of Penn., 39 Penn. St. 92. See also Clarke National Bank *v.* Bank of Albion, 52 Barb. 592.

Any language, it has been said, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, estops the bank thereafter, as against a *bona fide* holder of the check, from denying the want of funds to pay the same.[1]

4. *Transfer by Indorser after Liability fixed.*

An important case of estoppel arises where an indorser, whose liability has been fixed by notice of non-payment, again negotiates the paper. The late case of St. John *v.* Roberts[2] will illustrate the point. This was an action against the defendants as indorsers of a promissory note, payable to the defendants. Before the note matured it was indorsed by the defendants and deposited in bank; and on maturity payment was demanded of the maker, and, being refused, the paper was protested, and due notice given to the defendants. They then placed the note, with the protest annexed, in the hands of an auctioneer for sale. He sold it to the plaintiff, who paid the price and received the note. Judgment was given in the court below for the defendants, on the ground that there had been no demand of payment of the note of the maker, and notice thereof to the indorsers, after the transfer and delivery of the note to the plaintiff. But this judgment was reversed in the Court of Appeals.

"The Superior Court," said Davies, J., in delivering the opinion, "treated the case as if there had been a new contract by the defendants of indorsement, at the time of the transfer and delivery of the note to the plaintiff. It is well settled that when a note, once due, is indorsed and transferred, the indorser cannot be made liable upon his contract of indorsement, unless there has been, subsequent to such indorsement and transfer, a demand of payment of the maker, and notice to the indorser.[3] In this case there was no new contract of indorsement on the transfer and delivery of this note to the present plaintiff. The indorsers themselves put this note upon the market, after they had been legally and duly charged thereon, and made liable as indorsers thereon, with the evidence of such liability attached. Such act of theirs was a representation of their liability on the note, and they are now estopped,

[1] Pope *v.* Bank of Albion, 59 Barb. 226, 238. Per Barnard, J.

[2] 31 N. Y. 441 (1865).

[3] Leavitt *v.* Putnam, 3 Comst. 494.

in good faith and sound morals, from denying such liability. The plaintiff purchased the note as thus presented, and they have received the amount of the purchase-money, and should not be permitted to deny their liability."

After referring to Williams *v.* Mathews[1] as a case so nearly analogous as to be decisive on authority, the learned judge proceeded to say: "In the present case, the plaintiff dealt with Nicolay, the auctioneer, the presumptive holder of the note, and the plaintiff had no actual notice, or any notice to put him on inquiry, as to who was the holder or seller of the note. He had a right to assume that all the parties to the note were bound for its payment, and in this faith he made the purchase of it. . . . . We place our judgment in this case upon the ground that the defendants are estopped by their acts from controverting their liability upon the note, as indorsers thereof."[2]

[1] 2 Cowen, 252.

[2] An indorser may also be held liable by his conduct, though he has in fact been discharged for want of notice. Libbey *v.* Pierce, 47 N. H. 309.

CHAPTER XVII.

CORPORATIONS. — AGENCY. — PARTNERSHIP.

We do not propose to enter upon an elaborate examination of the doctrine of *ultra vires*, or of the powers of agents or partners, but rather to refer to some of the leading and most important cases upon the relation of these subjects to estoppel, and from them to deduce a few general rules, leaving the rest for other and appropriate works.

What we shall have to say here will, moreover, concern only the question of existence and powers; for where there is no dispute concerning the existence of the corporation, or the agency, or the partnership, or the power of either to perform the act out of which the conclusion is alleged, but the sole inquiry is whether the act or representation has generated an estoppel, the decision of the case must depend upon the ordinary general principles of estoppel.[1]

In the recent case of Webb *v.* Herne Bay Commissioners,[2] it appeared that the defendants had been incorporated as commissioners for the purpose of improving the town of Herne, and that they had been empowered to levy rates and to borrow money. For securing the payment of the loans they were authorized to issue debentures, in a prescribed form, bearing interest, and capable of assignment. The commissioners bought bricks for the purposes of the act from one Halket, *one of the commissioners*, contrary to the terms of the act, which imposed a penalty in such case. In order to provide for payment, they executed debentures in the prescribed form; and P. H. assigned them to the plaintiff for value, without notice of the circumstances. The commissioners having made default in the payment of interest, the present proceedings were instituted to compel them to apply their funds in this way; and the plaintiffs were held entitled to the remedy.

[1] There is ground for doubt whether the questions to be considered in this chapter really belong to the law of estoppel *in pais*. We are strongly inclined to think that they have been improperly connected with it. But we take the cases as we find them, and present the subject as it has been laid down by the courts.

[2] Law R. 5 Q. B. 642 (1870).

Lord Cockburn, C. J., said: "I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power . . . . only to borrow money, and it may be that, under the power to borrow, they were not authorized to give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures . . . . which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and, therefore, prohibited from entering into such a contract with the commissioners, or as to the fact of there being debentures given for goods supplied, instead of for money advanced. Under these circumstances, it is clear the principle laid down in Pickard *v.* Sears,[1] and Freeman *v.* Cooke,[2] is immediately applicable to the present case, as well as the doctrine laid down in the judgment of this court in the case to which my brother Blackburn referred, Re Bahia and San Francisco Railway Company.[3] . . . . I think the principle of all these cases is strictly applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but, according to the principle of the cases cited, they are estopped from alleging that the debentures were illegally issued."[4]

In Dooley *v.* Cheshire Glass Company,[5] which was an action of contract against a corporation, the same defence was alleged, that the corporation had never been duly organized. But the court refused to allow the proof. However the fact might have affected the corporation, had they been plaintiffs seeking the aid of the law to enforce a contract,[6] at all events, the court observed, the corpo-

[1] 6 Ad. & E. 469.
[2] 2 Ex. 654.
[3] Law R. 3 Q. B. 584.
[4] See *ante*, pp. 453 *et seq.*
[5] 15 Gray, 494.
[6] See *post*, p. 466.

ration could not set up a defect in their organization to defeat a recovery against them. Objections of this kind were not to be favored when made by a company holding themselves out as a corporation, and contracting liabilities as such.[1]

In Stoddard *v.* Shetucket Foundry Company,[2] a corporation was sued by a stockholder for his share in a dividend declared by the directors. The defendants denied their liability on the ground that the directors had no right to declare the dividend in question. The other stockholders had received and retained their shares. There was evidence tending to show that the dividend in question had not been earned, or, at all events, that it was not certain that it had been earned. The court refused to hear the defence.

In delivering judgment, Hinman, C. J., said: "As it does not appear that any statement of the affairs of the company was made at the time, and as, moreover, the dividend was made on the day when the balance of the unpaid subscriptions to the capital stock was called for, and was, in fact, applied in part payment of these subscriptions in favor of all the stockholders except the plaintiff, it would not, perhaps, be an unreasonable inference that the dividend was declared for the purpose of assisting the stockholders to pay up their subscriptions to the stock, without much reference to the fact whether it had been earned or not. But however this may be, the dividend was duly declared in point of form, and all the other stockholders have had the benefit of it in its application to the part payment of their subscriptions to the capital stock; and we do not think that, as between the company and Mr. Stoddard, it is for the company now to say that he shall be deprived of the benefit of a dividend which every other stockholder has received. We do not, therefore, as between these parties, consider the question whether the company was in a proper condition to declare so large a dividend as twenty-five per cent upon its capital as of any importance. When the other stockholders are willing to repay to the company the funds they assume they have withdrawn from it, they will stand in a better condition to call upon the court, by some proper application for that purpose, to restrain the plaintiff from withdrawing of the capital in the shape of a dividend."

[1] But it is held that public officers are not estopped, when personally sued, to deny their authority to do an act which has been done in their public capacity. Day *v.* Green, 4 Cush. 433. See Fairtitle *v.* Gilbert, 2 T. R. 169.

[2] 34 Conn. 542.

This seems to be a proper place to notice the case of municipal bonds, so far as the defence of illegality is concerned; for, though these instruments are technically deeds, being under seal, the doctrine of estoppel, as in the case of leases, does not, when applicable, seem to rest upon the seal, but rather upon matter *in pais*. Notwithstanding the seal, they are now regarded by the law as ordinary commercial paper, and are made subject to most of the rules pertaining to bills of exchange and promissory notes.

It is a well-established rule that a municipal corporation which issues bonds purporting on their face to be executed in conformity with a statute is estopped to deny the truth of such representation when they have been put upon the market.[1] The leading case upon this subject in the Supreme Court of the United States is Knox County *v.* Aspinwall, above cited. This was an action brought against the Board of Commissioners of Knox County, Indiana, to recover the amount due on two hundred and eighty-four coupons, for a sum amounting to $17,040. The coupons had been attached to bonds payable to a railroad company or bearer, each for $1,000, and represented the interest due on the bonds. The main ground of defence relied upon was, that the Board of Commissioners, the defendants, had no authority to execute the bonds or coupons; but this defence was overruled.

In delivering the opinion of the court, Nelson, J., said: "The ground upon which the want of authority to execute the bonds in question is placed, is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company. It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and further that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not, therefore, entitled to the character of *bona fide* holders of the securities. The act in pursuance of which the bonds were issued is a public statute of a

[1] Rogers *v.* Burlington, 3 Wall. 654; Moran *v.* Miami County, 2 Black, 722; Knox County *v.* Aspinwall, 21 How. 539; Knox County *v.* Wallace, 21 How. 546; Bissell *v.* Jeffersonville, 24 How. 287. See also Mercer County *v.* Hacket, 1 Wall. 83; Gelpcke *v.* Dubuque, Ib. 175; Meyer *v.* Muscatine, Ib. 384; Van Hostrup *v.* Madison, Ib. 291; Cincinnati *v.* Morgan, 3 Wall. 275.

State, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must, therefore, look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue of the bonds, when a majority of the voters of the country have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law. This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, Who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

"The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the day mentioned, and then declares, if a majority of the voters given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. . . . . We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way."

The learned judge proceeds to mention a further answer to the

defence, in the fact that the purchaser of the bonds had a right to assume that the vote of the county, which had been made a condition to the grant of the power, had been obtained, because the subscription had been made and the bonds issued. The bonds imported on their face a compliance with the law, and the holder was not bound to look further.[1]

In a late case in Connecticut,[2] the plaintiffs brought an action of debt for the interest on certain bonds which had been issued by the defendant. There had been a defect in the action of the citizens in regard to the insurance of the bonds, but of this the plaintiffs were ignorant when they took them. The bonds had been publicly sold, with the general knowledge of the citizens of the place; many of them had been deposited with the Treasurer of the State by sundry banks, as security for their circulation; and the city had paid the interest regularly until July, 1859, the payments being reported at the annual city meetings. None of the citizens had taken any measures to prevent the sale of the bonds, or the payment of the interest, or had given notice of any doubt as to their validity. The city was held estopped to dispute the validity of the bonds. Several cases cited in the note[3] were referred to by the court with approval.

There is considerable conflict among the authorities upon the doctrine of the preceding cases; but the tendency of the decisions, and, indeed, the decided weight of authority and of reason, sustain the positions there taken. The sound rule upon the subject we understand to be this: that a private corporation will be estopped to set up the defence of *ultra vires* in respect to all acts and contracts within the apparent scope of its powers; and that both private and public corporations will be estopped to set up such defects in their establishment or organization, or in the preliminaries to the execution of their acts, as are peculiarly within their own knowledge, and notice of which cannot be justly imputed to the other party.[4]

[1] Royal British Bank *v.* Turquand, 6 El. &. B. 327; Moran *v.* Miami Co., 2 Black, 722.

[2] Society of Savings *v.* New London, 29 Com. 174 (1860).

[3] State *v.* Van Horne, 7 Ohio St. 327; Knox County Com. *v.* Aspinwall, 21 How. 539; Tash *v.* Adams, 10 Cush. 252; Graham *v.* Maddox, 6 Am. Law Reg. 595; Gould *v.* Venice, 29 Barb. 442. See, also, Shoemaker *v.* Goshen, 14 Ohio St. 569; Bissell *v.* Michigan So. & N. Ind. R. Co. 22 N. Y. 258; Parish *v.* Wheeler, Ib. 494; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543.

[4] The reader is referred to a very clear statement of the subject in an article on *Ultra Vires*, in the American Law Review for January, 1871. 5 Am. Law Rev. 272.

The same principles, it would seem, should determine the question whether a party dealing with a corporation may set up the invalidity of the transaction, or the illegal organization, and, therefore, the non-existence of the corporation. Upon general principles, the estoppel should be reciprocal; and if available by the corporation, it should be available by the other party.[1] It may be difficult, however, to harmonize all of the decisions.[2]

We shall dispose of the remaining subjects of this chapter in a few words. A partner is the agent of the firm, and the principles of agency will in general determine his powers. We shall therefore make no division of the subjects of agency and partnership, but present them together.

In a recent important case,[3] a partner had made a misrepresentation concerning the business of the firm, by which another was induced to advance money; and the question was whether the innocent partners were liable for the fraud. The court held that they were so liable, being estopped to deny the truth of the representation.

Mr. Justice Selden, in delivering the judgment, said that the cases must be considered as establishing the proposition that where the authority of an agent depends upon facts outside the terms of his powers, and which from their nature rest particularly within his knowledge, the principal is bound by the representation of the agent, though false, as to the existence of the fact. There was no difference in this respect between the liability of the principal for the fraud of his agent, and that of a partnership for the fraud of one of its members. And the whole doctrine proceeded upon the ground that when one of two innocent persons must suffer by the act of a third person, he should suffer who had been the cause of the confidence reposed in such third person.

[1] See Eaton *v.* Aspinwall, 19 N. Y. 119. The court in this case say: "It would be palpably wrong to permit the defendant, who is one of the owners of the capital stock of this corporation, which operates and sues for his benefit, to set up the failure of its organization to perform a duty initiatory to its legal existence, when the plaintiffs, if sued by the corporation for the defendant's benefit, could not set up the same fact as a defence to them."

[2] See Montgomery *v.* Montgomery & W. Plankroad Co., 31 Ala. 76; Eppes *v.* Mississippi G. & T. R. Co., 35 Ala. 33; Howard *v.* LaCrosse & M. R. Co., Woolw. 49; Worcester Medical Institution *v.* Harding, 11 Cush. 285; Narragansett Bank *v.* Atlantic Silk Co., 3 Met. 282; Congregational Society *v.* Perry, 6 N. H. 164; Dutchess Cotton Manuf. Co. *v.* Davis, 14 Johns. 238; Black River & Utica R. Co. *v.* Clarke, 25 N. Y. 208; Cochran *v.* Arnold, 58 Penn. St. 399; McBroom *v.* Lebanon, 31 Ind. 268.

[3] Griswold *v.* Haven, 25 N. Y. 595 (1862).

It was clear, the learned judge further remarked, that the entire class of cases in which it had been held that a partnership was liable to a *bona fide* holder upon a note fraudulently issued in its name by one of the partners, depended upon one common principle. The mode in which the liability was enforced was by estoppel *in pais*. The agent or partner had made a representation as to a fact essential to his power, upon the faith of which the other party had acted, and the principal or firm was precluded from controverting the fact so represented.[1]

The doctrine has also been referred to estoppel *in pais*, that where one intentionally or negligently holds himself out as a partner of a firm, and the representation has been acted upon by others, without knowledge or notice of the truth of the matter, such party will be held liable to such persons. He will not be permitted to allege that he is not a partner in the firm.[2]

It is also a well-established principle that where the true owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which he caused or allowed to appear to be vested in the party making the sale.[3]

[1] See *ante*, p. 456.

[2] Vibbard *v.* Roderick, 51 Barb. 616; Conklin *v.* Barton, 43 Barb. 435; Sherrod *v.* Langdon, 21 Iowa, 518. See Story, Partnership, § 64, and authorities cited.

In Mitchell *v.* Ostrom, 2 Hill, 520, it was held that one who had signed a partnership name as a "late firm" was not estopped to deny his joint liability on the note. See, also, Shirreff *v.* Wilks, 1 East, 48; Hawks *v.* Munger, 2 Hill, 200. Merely subscribing one's name to the subscription book of a corporation does not estop the party to deny that he is a stockholder. Lathrop *v.* Kneeland, 46 Barb. 432. But if in addition to this he has paid calls and done other acts recognizing the validity of his subscription, he will be estopped to deny his membership. Boggs *v.* Olcott, 40 Ill. 303.

[3] McNeil *v.* Tenth National Bank, 46 N. Y. 325; Pickering *v.* Busk, 15 East, 38; Gregg *v.* Wells, 10 Ad. & E. 90; Saltus *v.* Everett, 20 Wend. 267, 284; Mowrey *v.* Walsh, 8 Cow. 238; Root *v.* French, 13 Wend. 570. See *post*, pp. 473 *et seq.*

CHAPTER XVIII.

ACKNOWLEDGMENT OF RECEIPT.

THAT a receipt is not conclusive evidence of the fact stated is clearly settled.[1] This case first cited was an action by partners on a bill of exchange. The defendant, in proof of payment, gave in evidence a receipt. The receipt was in the name of the firm, and had been written by Farrar; but the plaintiffs contended that it had not been given *bona fide*, but procured for the purposes of the cause. The question was left to the jury, and a verdict was returned for the plaintiffs. A motion for a new trial was overruled.

Lord Denman, who delivered the judgment, now said: "Mr. Cresswell cited Alner *v.* George;[2] but that case is not directly applicable. There, no doubt existed that the receipt had been really given by the party whose claim it affected; but it was alleged that third persons, who had an interest in the demand, were injured by the transaction. Lord Ellenborough held that the receipt was nevertheless binding. Here the objection is, that the receipt, though signed by one of the firm for whom it is given, is a fraud upon the rest. In Benson *v.* Bennett,[3] . . . . a receipt, signed by the plaintiff, was produced by the defendant, but he was proved to have obtained it from the plaintiff by deception, and therefore it was held not binding. It appears to us that in all cases a receipt signed by a party, and produced afterwards to affect him, is evidence, but evidence only, and capable of being explained."

In another case, Mr. Baron Martin said that Alner *v.* George, *supra*, was not law.[4] The case cited was an action of trover. It

[1] Farrar *v.* Hutchinson, 9 Ad. & E. 641; Skaife *v.* Jackson, 3 Barn. & C. 421; Graves *v.* Key, 3 Barn. & Ad. 313; Bowes *v.* Foster, 2 Hurl. & N. 779; Baker *v.* Union Mutual Life Ins. Co., 43 N. Y. 283; Sheldon *v.* Atlantic Fire & M. Ins. Co., 26 N. Y. 460; Insurance Company of Pennsylvania *v.* Smith, 3 Whart. 520; Pitt *v.* Berkshire Life Ins. Co., 100 Mass. 500; Miller *v.* Brooklyn Life Ins. Co., 2 Big. 35, 757. *Contra*, Providence Life Ins. Co. *v.* Fennell, 49 Ill. 180. Nor does a bill of lading estop the original parties to deny the shipment. Berkley *v.* Watling, 7 Ad. & E. 29. We have seen that a receipt is not conclusive even when under seal. See *ante*, p. 313.

[2] 1 Camp. 392.

[3] 1 Camp. 394, note.

[4] Bowes *v.* Foster, 2 Hurl. & N. 779.

appeared that the plaintiff, being in difficulty, and fearing his creditors, had agreed with the defendant, a creditor, that there should be a pretended sale of his goods to him. An invoice was accordingly made out, and a receipt given to the defendant for the sum stated to be the purchase-money, and possession was given the defendant. The plaintiff was allowed to recover.

Mr. Baron Martin said: "In Alner *v.* George, Lord Ellenborough said that a receipt in full was an estoppel; and if that be so, there would be an estoppel here. But I apprehend that case is not law. The distinction between a receipt and a release has been long established. The fact of a release must be pleaded and put on the record. A receipt cannot be pleaded in answer to the action; it is only evidence on a plea of payment; and where a defendant is obliged to prove payment, a document not under seal is no bar as against the fact that no payment has been made; for how can a jury find that payment was made when it was proved that none was ever made?"

The case of Graves *v.* Key[1] was an action on a bill of exchange, on which was written a receipt for the full amount. In point of fact the money had not been paid by the acceptor or by the drawer, but had been paid by a person who had simply purchased the bill. The plaintiff recovered.

Lord Tenterden said: "We all think, upon full consideration, that the action is maintainable. It is not necessary for us to say what the effect of these indorsed memoranda of receipts would be, supposing that it were incompetent for the plaintiff to contradict or explain them by parol evidence; because it seems to us that the plaintiff may by law give such contradiction or explanation, and that in this case the parol evidence does satisfactorily explain the last memoranda made on each security, and shows distinctly that the balance was not paid by either Almon or the defendants. A receipt is an admission only; and the general rule is, that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. A receipt may, therefore, be contradicted or explained."

This doctrine has recently been declared in the Court of Appeals of New York.[2] The case cited was an action on a life-insurance

[1] 3 Barn. & Ad. 313.

[2] Baker *v.* Union Mutual Life Ins. Co., 43 N. Y. 283.

policy. Acknowledgment of receipt of the premium, contrary to the fact, was embodied in and indorsed on the policy; but this was held only *prima facie* evidence of payment. In this case there was the additional circumstance of the ignorance of the plaintiff, to whom the policy was made payable, of the fact of non-payment, and it was contended that she was thrown off her guard by the receipt, and might have herself paid the premium at the proper time and saved the policy; but the circumstance was held immaterial.

It may be worthy a *quære*, however, if this did not bring the case within the rule in the recent case of Knights *v.* Wiffen.[1] In the Superior Court of New York this had been held an estoppel.[2]

But a receipt may, when acted upon by a third person, as has been intimated, estop the party giving it to deny its purport.[3] Such a case was recently decided by Mr. Justice Miller, of the Supreme Court of the United States, on the circuit.[4] In the case referred to, it appeared that the defendants had given a warehouse receipt to Upham & Co. for eight hundred bushels of wheat. Upham agreed with the plaintiffs to sell them a larger quantity of wheat, and in part execution of this agreement assigned to the plaintiffs the above-mentioned receipt. The plaintiffs thereupon presented the receipt to the defendants, and demanded the wheat, and, being refused, they brought the present action. The defendants offered to prove that they had never received the wheat from Upham & Co., and that they had no such wheat as that mentioned in the receipt, but that they had issued the receipt as a security for money loaned. The evidence was held inadmissible.

"Instruments of this kind," said the court, referring to bills of lading and warehouse receipts, "are *sui generis*. From long use in trade they have come to have, among commercial men, a well-understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale.[5]

"When a warehouseman issues such a receipt, he puts it into the power of the holder to treat with the public on the faith of it.

[1] Law R. 5 Q. B. 660 (1870).

[2] 1 Big. 595.

[3] Carr *v.* Miner, 42 Ill. 179; People *v.* Reeder, 25 N. Y. 302.

[4] McNeil *v.* Hill, Woolw. 96 (1865).

[5] Austin *v.* Craven, 4 Taunt. 644; Whitehouse *v.* Frost, 12 East, 614; White *v.* Wilks, 5 Taunt. 176; Conard *v.* Atlantic Ins. Co., 1 Peters, 386; Gardiner *v.* Suydam, 7 N. Y. 357; Gibson *v.* Chilli cothe Bank, 11 Ohio St. 311.

He enables him to say, and to induce others to believe, that he has certain property which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt, so as to injure a party who has been misled by it. This is within the most exact definition of estoppel. If A gives to B his note for $100, although he has received no value therefor, and may defend against the note in a suit brought by B, yet if B sells the note to a third party, who does not know of the facts, A then must pay the note. Just so in the case of a warehouse receipt. If A issues such a paper to B, for articles which he has never received, a third party treating with B, on the faith of the statement and promise contained in the receipt, will hold A for the goods or their value. It is of no consequence what the transaction may be between the original parties,—whether the receipt, as is claimed here, was intended as a security for a loan, or was entirely false."

CHAPTER XIX.

ESTOPPEL BY CONDUCT.

THE origin of the peculiar branch of estoppel now to be considered — that by which a party and those in privity with him are estopped to deny the truth of representations made to and acted upon by another — we conceive to be found in the doctrine of equity,[1] that if a representation is made to another, who deals upon the faith of it, the former shall make the representation good, if he knew it to be false.[2] Lord Eldon, in the case just cited, speaks of this as "a very old head of equity." And the same principle had been adopted at law several years before this remark was made.[3]

In order to justify the interposition of equity in the case mentioned, it is necessary to establish, not only the fact of misrepresentation or concealment, but also that it has been in a matter of substance or of importance to the interests of the other party, and that it has actually misled him. For if the misrepresentation was of a trifling or immaterial thing, or if the party alleging it did not in fact trust in it, or was not misled by it, or if it was vague or inconclusive in its nature, or if it was upon a matter of opinion or fact equally open to the knowledge of both parties, and in regard to which neither could be presumed to trust the other, — in these and the like cases it is said that equity will not grant relief.[4] We shall see, in the course of the present chapter, that these matters are the key to the question of estoppel *in pais;* and we shall find here the true extent and limits of the doctrine.

We must now call attention to a few of the leading cases in which the doctrine of estoppel by conduct is defined; and we shall then pass on to a detailed examination of it.

The first distinctive enunciation in England of this branch of estoppel was made in the well-known case of Pickard *v.* Sears,[5] —

[1] See Brewer *v.* Boston & W. R. Co., 5 Met. 478, 483.

[2] Evans *v.* Bicknell, 6 Ves. 174, 182; Slim *v.* Croucher, 1 DeG. F. & J. 518; Lee *v.* Monroe, 7 Cranch, 366.

[3] Pasley *v.* Freeman, 3 T. R. 51.

[4] 1 Story, Eq. Jur. § 191.

[5] 6 Ad. & E. 469.

a case which bears about the same relation to this part of our subject as that of the Duchess of Kingston does to estoppel by record. The doctrine had, indeed, been foreshadowed and applied in a few of the earlier cases;[1] but in Pickard *v.* Sears it was first presented in its peculiar distinctive character.

This was an action of trover for machinery, to which the defendant pleaded not guilty, and that the plaintiff was not possessed, etc. Issue was taken upon the pleas. On the trial at *nisi prius*, before Lord Denman, it appeared that the plaintiff was the legal owner of the machinery under a mortgage from one Metcalf, and that the property had been levied upon, subsequently to the execution of the mortgage, as Metcalf's, and sold by the sheriff to the defendants. Notice of this mortgage was given by the plaintiffs to the defendants *after* the sale to them of the property. It further appeared that, after the seizure, the plaintiff had repeatedly conversed about the same with the witness, — who was the attorney of Hill, the plaintiff in the execution, — sometimes in Metcalf's presence, *and had never made any claim to the goods*, though he stated that Metcalf was his debtor for about £ 500, and frequently consulted with the witness as to the best way of disposing of the property; that after a negotiation for sale had been made, the witness had advised the plaintiff and Metcalf to try to raise £ 1,000, to pay off the execution creditor, and the remainder to go to carry on the business; that the plaintiff had named a party from whom it was attempted, but without success, to obtain the money; and that the witness *had told the plaintiff that the defendants were about to purchase the property*. It was not disputed that the mortgage had been made in good faith, or that the defendants had purchased *bona fide*, and without notice of the mortgage. A plea of leave and license having been refused, the defendants suggested that it should be left to the jury to say whether the plaintiff had concurred in the sale; but his lordship was of opinion that there was no evidence of such concurrence, and directed the jury to find for the plaintiff, if they thought that the mortgage had been made *bona fide*. A verdict having been given for the plaintiff, a rule for a new trial was now argued before Lord Denman, C. J., and Williams and Coleridge, JJ.

Counsel for the plaintiff argued that the articles were in Met-

[1] Heane *v.* Rogers, 9 Barn. & C. 586; Graves *v.* Key, 3 Barn. & Ad. 318, note; Mildway *v.* Smith, 2 Wms. Saund. 343.

calf's possession according to the intention of the mortgage deed, and that there was no badge of fraud. The property was in the plaintiff, and had never passed to the defendants. This was the only question open on the pleadings; no doubt being raised as to the conversion, which alone could be disputed under the plea of not guilty. The fact that the plaintiff made no objection when the sale was going to take place without his knowledge[1] could not divest him of the property. He was not bound to interfere. The jury, therefore, should have been asked whether the plaintiff authorized the sale.

Counsel for the defendants urged that the sale took place with the knowledge of the plaintiff, and virtually by his authority. He had full power to authorize a sale, either generally, or to a particular party; and his acts went far enough to give the authority. He could not, then, dispute that the sale was valid, and transferred the possession, so as to support the second plea. His conduct induced the attorney of the execution creditor to change the situation of the parties; and the case resembled that of admissions made, upon which the party to whom they were made acts so as to change his situation. In such case the party making the admission was estopped from disputing the same.[2] The decision was given in favor of the defendants.

Lord Denman, C. J., in delivering judgment, said: "Much doubt has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendant, and however much they might be evidence of the goods not being his, in the sense that any persons, and amongst others the defendants, would be naturally induced thereby to believe that they were not, furnished any real proof that they were not his. His title having been once established, the property could only be divested by gift or sale; of which no specific act was even surmised.

"But the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from aver-

[1] What was meant by this, it is difficult to understand. The evidence, as we have seen, showed that the plaintiff was informed that the defendants were about to buy the machinery.

[2] Referring to Graves v. Key, 3 Barn. & Ad. 318, note; Heane v. Rogers, 9 Barn. & C. 586.

ring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature that the opinion of the jury ought, in conformity to Heane *v.* Rogers, and Graves *v.* Key, to have been taken, whether he had not, in point of fact, ceased to be the owner. That opinion, in the affirmative, would have decided the second issue in the defendant's favor."

It should be noticed *first*, that it does not appear that the defendants were present at any of the conversations between Hill and the plaintiff concerning the disposition of the property;[1] and, *secondly*, that the court did not decide that, in point of law, the conduct of the plaintiff amounted to an authorization of the sale, but left it to the jury to decide whether the plaintiff had ceased to be the owner of the machinery.[2] It would seem from the language of Lord Denman, that, in order to a decision in favor of the defendant, it would be necessary for the jury to be satisfied that the plaintiff had "wilfully" caused the defendants to believe that he had no claim upon the property, and had thereby induced them to purchase, or that a gift or sale by the plaintiff should be proved; and that the conduct of the plaintiff so far tended to prove the one thing or the other that the case should have been submitted to the jury on this point.

The doctrine of Pickard *v.* Sears had been declared and enforced several years earlier in America,[3] though no distinct definition of the estoppel was given in the case first referred to. The plaintiff in this case (Baird) declared in trover for the conversion of certain lumber. It appeared that the lumber was the joint property of the defendant and one Benedict; one fifth of it belonging to Benedict, and the rest to Stephens. The plaintiff had purchased the lumber under an execution sale against Benedict, which sale had taken place in this way: The execution creditor sent the officer to

[1] See Reynolds *v.* Lounsbury, 6 Hill, 534. It is said in Thompson *v.* Blanchard, 4 Comst. 303, 310, that it is not necessary that the party making the representation should have been present when it was acted upon. Per Jewett, J.

[2] See McNeil *v.* Tenth National Bank, 46 N. Y. 325.

[3] Stephens *v.* Baird, 9 Cowen, 274 (1828); Welland Canal Co. *v.* Hathaway, 8 Wend. 480 (1832).

Stephens, told him he had an execution against Benedict, and asked him to point out to him the lumber which Benedict owned. Stephens then showed him a quantity, and told him that Benedict owned a fifth part of it. Such a part was then levied upon and receipted for, and sold to Baird, without notice of any claim by Stephens. The latter now attempted to set up the defence that Benedict's interest was under a special executory contract, which he had not performed; but the court refused to hear the defence.

"It would be a violation of good faith," said Sutherland, J., in delivering the judgment, "to permit him now to set up any special agreement between him and Benedict to defeat the title of the plaintiff below, who was a *bona fide* purchaser at the constable's sale. Then was the time for the defendant below to have given notice of the special agreement. He is precluded, then, from saying that Benedict had not an interest in the property which could be sold upon execution, or that that interest was subsequently forfeited by the omission to fulfil the special agreement on his part."[1]

In the case of Welland Canal Company *v.* Hathaway,[2] decided in 1832, it was contended that the defendant had estopped himself from denying that the plaintiffs were a corporation, by a receipt which he had given to them in their corporate name, and by entering into the contract with them upon which the suit was brought. But it was held that the defendant was not estopped.

"There are many acts," Nelson, J., observed, in delivering judgment, "which have been adjudged to be estoppels *in pais*, . . . but in many and probably most instances, whether the act or admission shall operate by way of estoppel or not must depend upon the circumstances of the case. As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. The case of the First Presbyterian Congregation of Salem *v.* Williams[3] strikingly illustrates this general proposition. There the plaintiffs, by their attorney, called upon the defendant for his rent, and inquired if there was any property upon the premises out of which it could be collected by distress. He answered there was not, and pointed out all the property he had, which was but a trifle. On the trial of the ejectment,

[1] See Dewey *v.* Field, 4 Met. 381.

[2] 8 Wend. 480.

[3] 9 Wend. 147.

brought for the default in payment of the rent, the defendant offered to show there was sufficient property on the premises out of which the rent could have been collected. The court decided that he was estopped from disputing the truth of his admission to the plaintiff's attorney. All the cases I have seen, in which the acts or admissions of the party are adjudged to operate against him, in the nature of estoppel, are generally cases where, in good conscience and honest dealing, he ought not to be permitted to gainsay them. From this brief view of the nature and reasons of the law of estoppel, as sought to be applied by the plaintiffs, I am satisfied the case under consideration does not fall within them. The plaintiffs held themselves out to the world as a corporate body, duly constituted to transact business in the manner and under the circumstances detailed in the special verdict, and the defendant has contracted with and done labor for them under the supposition that these professions were correct. If they have not the powers and privileges assumed on their part in their dealings with him, it is their own fault, not his. Whether they had these powers must have been known to themselves, not to the defendant, and no act of his could legally add to or detract from them. Why then should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner, and before a tribunal, which can entertain their suit only upon the proof or assumption that they are a corporate body, duly constituted by competent authority?

In Dezell *v.* Odell[1] it appeared that the plaintiff, a constable, having levied upon goods, delivered them to the defendant on his giving a receipt promising to redeliver them by a given day, and that when the day arrived he refused to comply with his promise, and claimed that the goods were his own at the time the levy was made. But the court held him estopped, in trover for the goods, to set up this defence.

Cowen, J., speaking for the court, said: "It may be conceded that had the defendant's claim been interposed at the time of the levy, and he had signed the receipt in terms, without prejudice to his right, the question would have been open. The creditor would thus have been put upon his guard, and enabled to seek for other property, on finding that his debtor had no title to that in

[1] 3 Hill, 215.

question. Indeed, here was a course of action on the part of the receiptor directly calculated to influence the conduct of the creditor in a way prejudicial to his interests, unless we hold the receiptor. The officer being induced to part with the possession, or to forbear taking actual possession, by the receiptor recognizing his right and agreeing to take or hold for him, was itself an injury; if we now let the defendant go free, we then have a clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understood to be the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive. The principle is the same as that which prevails between landlord and tenant. The latter must surrender possession simply because he has received it.

"The general doctrine is not denied. The argument is, that it should not be applied in favor of an officer coming under pretence of legal authority, and demanding the property. It is thought the receiptor should be taken to have been coerced into the giving of a receipt as the only expedient for retaining the possession. I think otherwise. If a man have a title, an officer is no more in respect to him than a mere stranger. He may either use the necessary force to retain possession, or take the more usual and prudent course of an action at law for the wrongful seizure. In short, his remedies are, in this respect, the same as those of any other proprietor whose rights are improperly interfered with. The intendment against him is, therefore, the same as it would be against a man in possession of land taking a demise from an adverse claimant. It is not enough for him afterwards to show that he had title. If he can show in addition that he was drawn into the admission of an adverse title by fraud, or, perhaps, by some gross mistake of fact, he may be able to defend himself.[1] But by taking and holding, he draws the *onus* of showing the fraud or mistake upon himself. The defendant below offered no proof of the kind; but, on the contrary, it is entirely apparent that the title which he proposed to set up at the trial was known to him at the time of the levy and receipt. The officer was, when he came to sell, for the first time apprised that the defendant had

[1] See *ante*, pp. 384 *et seq.*

title. This was in general terms. At the trial he proposed to show that he had purchased it of a third person with his own funds. In short, his conduct may be summed up in this way: He had fraudulently deprived the creditor of possession through the officer, baffled him in his search for other property, and in the use of all means for collecting his debt, drawn him by equivocal conduct into the expense of an action, and at the trial claims the whole as constituting a legal defence. I think it was not so, for the simple reason that the law uniformly throws the consequence of such a course upon the party who leads in it, by applying the salutary doctrine of estoppel *in pais*."

The foregoing cases will be sufficient to show that all of the following elements must be present in order to an estoppel by conduct: —

1. There must have been a *representation* or a *concealment* of material facts.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant of the truth* of the matter.

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced to act upon it.*

The consideration of each of these elements in detail must occupy the remainder of this chapter; and, first, of

1. *The Representation.*

The representation of which we now speak — a term which will be frequently employed as embracing both active and passive conduct, both words and silence, acts and concealment — is always *external* to any contract or transaction between the parties, where such is entered into or performed, and is something not necessarily involved in it. This is one of the distinctions between the class of cases now to be considered, and those presented in the preceding chapters. But the more usual case, and the broader distinction, is where a transaction has by the representation been effected between the party alleging the estoppel and a third person.

A single case will be sufficient to show what is meant by the first of these distinctions; the other distinction, and, indeed, both of them, will be abundantly illustrated throughout the chapter.

In Clark *v.* Sisson,[1] an action was brought against the acceptors and indorsers of a bill of exchange, which recited that it had been drawn for value. It was proved, however, that it was accepted for the accommodation of the drawer, without consideration. The plaintiffs discounted the note at a usurious rate of interest, and the defendants contended for the right to prove that the paper was an accommodation bill, having no inception until its usurious discount by the plaintiffs. The plaintiffs, on the other hand, contended that the defendants were estopped by the very terms of the bill; but the court decided the point in favor of the defendants.

"In point of law," Comstock, C. J., observed, in delivering judgment, "the transaction was a usurious loan of money. It was a loan, because it could not be anything else. The plaintiffs could not purchase a bill which had no owner, in other words, which had no legal existence until it came to their hands. It is true that the words 'value received' were a part of the instrument, and these words imported that the bill was drawn and accepted for value in the hands of the drawee or acceptor. It may also be assumed that the plaintiffs supposed they were purchasing an obligation which bound the parties before they advanced their money upon it. But these circumstances do not relieve the case. Neither the drawer nor the acceptor made any representations to the plaintiffs beyond the language contained in the contract itself. But if the very words of a contract are to be taken as a representation of facts, which estops the party who makes the obligation from interposing a defence inconsistent with that representation, then all contracts must be deemed valid which appear to be so on their face, and not only usury, but duress and fraud, can no longer be alleged. Such is not the rule of law."[2]

The representation or concealment must, also, in all ordinary cases, have reference to a present or past state of things; for if a party make a representation concerning something in the future it must generally be either a mere statement of intention or opinion, uncertain to the knowledge of both parties, or it will come to a contract, with the peculiar consequences of a contract. The point is well illustrated in a recent case[3] in Massachusetts, where the plaintiff sued the defendant as maker of a promissory note; to

[1] 22 N. Y. 312.

[2] Mechanics' Bank *v.* New Haven R. Co., 13 N. Y. 599, 638.

[3] Langdon *v.* Doud, 10 Allen, 433 (1865); S. C. 6 Allen, 423.

which the Statute of Limitations was pleaded. The plaintiff introduced evidence to show that in March, 1855, the defendant, who then lived in Massachusetts, told the plaintiff that he was going to California in about a month from that time, never to return, and would within that month pay the note; and that he left for California the next day, and remained there till the autumn of 1858, when he returned to Massachusetts. The plaintiff also offered evidence to prove that he was induced by the defendant's statements to believe that the defendant never would return to Massachusetts, and therefore did not bring any suit during his absence, believing that the defendant intended to reside in California, and that, if he should happen to return, the time of his absence would be excluded; but the evidence was not received.

Having stated the general rule in respect to misrepresentations which have been acted upon, Bigelow, C. J., speaking for the court, further observed: "Such a representation is sometimes, though not very accurately, said to operate as an estoppel; but its effect is rather to shut out a party from offering evidence in a court of justice, contrary to previous statements.[1]

"Without undertaking to define the nature or kind of representations which will thus operate to preclude a party, we think it very clear that the statement proved at the trial of this case, which the plaintiff seeks to set up for the purpose of excluding the defence of the Statute of Limitations, does not come within the rule. In the first place it does not appear that the representation made by the defendant of his intention to abandon his domicile in Massachusetts, and to take up his residence in California, was not perfectly true at the time it was made, and that he did not make it in entire good faith, and with the purpose of carrying it into execution. This, however, may not be a decisive consideration. But, in the next place, it was a representation only of a present intention or purpose. It was not a statement of a fact or state of things *actually existing, or past and executed*, on which a party might reasonably rely as fixed and certain, and by which he might properly be guided in his conduct, and induced to change his position in the manner alleged by the plaintiff. The intent of a party, however positive and fixed, is necessarily uncertain as to its fulfilment, and must depend on contingencies and be subject to be

[1] Howard *v.* Hudson, 2 El. & B. 1; Audenried *v.* Betteley, 5 Allen, 382; Plumer *v.* Lord, 9 Allen, 455.

changed and modified by subsequent events and circumstances. Especially is this true in regard to the place of one's domicile. On a representation concerning such a matter no person would have a right to rely, or to regulate his action in relation to any subject in which his interest was involved as upon a fixed, certain, and definite fact or state of things, permanent in its nature and not liable to change. A person cannot be bound by any rule of morality or good faith not to change his intention, nor can he be precluded from showing such a change, merely because he has previously represented that his intentions were once different from those which he eventually executed. . . . . The reason [of the doctrine of estoppel] wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action."[1]

The difference between estoppel *in pais* and contract may be thus illustrated: A consigns a cargo of freight by B from New York to New Orleans, and B assures A that the freight will arrive at New Orleans on a day named. A makes his preparations to receive it and charters a steamer to take it on the day named and convey it up the Red River. The cargo is not delivered to A when due, and he brings trover against B, affirming its arrival at New Orleans on the particular day, and its conversion then and there. Will B be estopped to deny the arrival of the cargo on the day alleged, by reason of his representation that it should then arrive? Certainly not, if it was only a representation, however strongly made, and however certain it may be that he acted upon it in good faith; and for the reason that in the nature of things the event was uncertain, — it was a mere expression of intention, and A should not have placed such implicit reliance upon the statement. The event was future, and it could not be known; so that the case differs entirely from a representation concerning past or existing facts.

Nor could B be estopped if the statement had gone further, and become a contract that the goods should arrive on the particular day. The case would then be simply a breach of contract, for which B would be liable in a proper form of action; but he could not be compelled to pay the value of the cargo, on the ground

[1] So Jordan *v.* Money, 5 H. L. Cas. 185.

that he was estopped to deny the arrival of the goods at the time agreed upon. If the only defence B had was the subsequent arrival of the cargo, — and this is the case supposed, — the effect of estopping him to deny the due arrival would be to compel him to pay the value of the goods; so that the plaintiff would gain a great advantage by suing in this way over suing for the breach of contract. For in the latter form of action he would recover only the amount of actual loss sustained by the non-arrival of the goods on the day agreed.[1]

In the case of estoppel *in pais*, as in the other branches of estoppel, only parties and their privies are bound by the representation, and only those to whom the representation is made or intended to influence, and their privies, may take advantage of the estoppel. If the act was *res inter alios acta*, there will be no estoppel.[2] This appears from the case of Regina *v.* Ambergate, &c. Railway Company.[3] This was a *mandamus* to compel the defendants to proceed with the building of their railroad. The reply was that their capital stock had not been subscribed, and could not be obtained, and that they were forbidden by statute to exercise their powers in the mean time. To this the answer was made, by way of estoppel, that the defendants ought not to be admitted to make this defence, because the company had acted under the compulsory clauses of their charter in another part of the line, where an arbitration had taken place in the form prescribed by the State.

But the court observed that this was *res inter alios acta*, and could not operate as an estoppel between the prosecutors and the defendants.

It is held that the acts and admissions of one of several admin-

[1] The distinction between contract and estoppel *in pais* was thus stated, in substance, in White *v.* Walker, 31 Ill. 422, 437: Though a promise to forgive a debt, or to forbear its collection, either temporarily or for an indefinite period, unsupported by any consideration, is ineffectual as a defence, viewed merely as an agreement; yet if the surety has been induced by such an assurance to neglect any of the means which might have been used for his indemnity, the promise may have that effect as an estoppel which it wants as a contract, and amount to a defence against any subsequent action brought by the creditor. See Harris *v.* Brooks, 21 Pick. 195.

[2] But it is held that an act which estops a principal will estop his surety. McCabe *v.* Raney, 32 Ind. 309. But even in the case of a compromise by deed of matters concerning an estate, if one of the parties is merely a formal party, receiving nothing under the deed, he will not be estopped to make a claim upon the estate if there has been no concealment or imposition practised upon the other parties. Walker *v.* Walker, 9 Wall. 743.

[3] 1 El. & B. 372.

istrators, which amount to an estoppel against him, will work an estoppel against all.[1] In the case cited, one of three administrators had been present at a levy by an officer, and did not object to it, and afterwards encouraged the sale of the property. Subsequently the administrators brought a joint action of trespass against the officer for making the levy; and the court held that it could not be maintained.

"If there are several administrators," it was said, "they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the intestate, which is incapable of being divided; and in case of death such interest shall vest in the survivor, without any new grant from the court. Acts done by one of several executors or administrators relating to the delivery, sale, or release of the testator's or intestate's goods, are the acts of all.[2] So, two of three executors or administrators may compromise a claim and release a debtor to the estate without the concurrence and contrary to the wish of the other."[3]

The Supreme Court of Massachusetts have expressed the opinion, in a *dictum*, that the doctrine of estoppel *in pais* has no application to married women or infants.[4] A married woman, it was observed in Lowell *v.* Daniels, "can make no valid contract in relation to her estate. Her separate deed of it is absolutely void. Any covenants in such separate deed would be likewise void. If she were to covenant that she was sole, was seized in her own right, and had full power to convey, such covenant would avail the grantee nothing. She could neither be sued upon them nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection, her safety in her weakness. Her most solemn acts, done in good faith, and for full consideration, cannot affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of Concord Bank *v.* Bellis,[5] in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to

[1] Camp *v.* Moseley, 2 Fla. 171.

[2] Wheeler *v.* Wheeler, 9 Cowen, 34.

[3] Murray *v.* Blatchford, 1 Wend. 583.

[4] Lowell *v.* Daniels, 2 Gray, 161, 168; Bemis *v.* Call, 10 Allen, 512, 517. So in Delancey *v.* McKeen, 1 Wash. C. C. 354. But it did not appear in this case that the *feme* was conversant with the facts. See, also, Bank of United States *v.* Lee, 13 Peters, 107; Drury *v.* Foster, 2 Wall. 24; Glidden *v.* Strupler, 52 Penn. St. 400; Morrison *v.* Wilson, 13 Cal. 494; Rangeley *v.* Spring, 21 Maine, 130.

[5] 10 Cush. 276.

secure a part of the purchase-money, such deed of mortgage was wholly void. And we think a married woman cannot do indirectly what she cannot do directly, cannot do by acts *in pais* what she cannot do by deed, cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate. This doctrine of estoppel *in pais* would seem to be stated broadly enough when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates."

Parties under disability, as infants and married women, certainly are not estopped unless their conduct has been intentional and fraudulent.[1] In Schnell *v.* Chicago, just cited, a bill was filed to restrain the defendants from setting up their legal title to certain land. It appeared that this land had been sold to a party under whom the plaintiff claimed, by an administrator, for the purpose of raising money to educate one of the defendants, then fifteen years old, upon whom the title to the property had fallen by descent. The minor, it further appeared, had been desirous of being educated, and with her consent and that of her mother the latter was offered for sale; and the purchaser, before buying, consulted both the mother and daughter as to their wishes, and they expressed their consent to the sale. The land was thereupon sold for what was then deemed a fair price, and the proceeds were partly applied to the education of the minor, and partly invested in other land, in her name, but at the sole direction of the administrator. The court held that these facts were insufficient to work an estoppel upon the infant.

Mr. Justice Lawrence, in delivering judgment, said: "Undoubtedly an infant is responsible in damages for his torts and frauds. If he were to falsely allege himself to be of age, for the purpose of inducing another person to purchase and take a deed of

[1] Kane County *v.* Herrington, 50 Ill. 232; Schnell *v.* Chicago, 38 Ill. 382; Davidson *v.* Young, Ib. 146; Rogers *v.* Higgins, 48 Ill. 211; Schwartz *v.* Saunders, 46 Ill. 18; Brown *v.* Coon, 36 Ill. 243; Miles *v.* Leingerman, 24 Ind. 385; McCoon *v.* Smith, 3 Hill, 147. And it is held that a married woman is not estopped by confessing a judgment from afterwards denying that the debt for which it was rendered enured to her benefit. Baines *v.* Burbridge, 15 La. An. 628. See Patterson *v.* Fraser, 5 La. An. 586.

his lands, he would be liable to respond in damages for any injury which might result to the purchaser in consequence of the deceit. Whether he would be estopped in a court of chancery from disaffirming such a conveyance on his arriving at majority is a question which, upon the authorities, is by no means clear. There seems, however, to be only a technical reason why the doctrine of equitable estoppel should not, in such cases, be applied; and in a case of that character, we should be strongly inclined to hold the infant bound. But in the case at bar, the infant made no false statement to the purchaser, and perpetrated no fraud. She simply *consented* to the sale of the land by the administrator. Now if an infant is not bound by the solemn and deliberate consent manifested by her own conveyance of her land, we do not know by what process of reasoning it can be made to appear that she is bound by her parol consent that another shall make the conveyance. The rights acquired by Newhall, under a sale by the administrator with the consent of Margaret [the minor], were certainly not greater than if she had made the sale herself, and at the same time given her own deed for the land. Yet such a sale and conveyance, unaccompanied by false representations, would have given Newhall no legal or equitable title which Margaret would not be at liberty to disaffirm. So far as the alleged equitable estoppel is based upon the consent given to the sale, the position of the appellant is clearly untenable."

In a recent case in Indiana,[1] it appeared that an infant *feme covert* joined with her husband in conveying her land to a railroad company, by which it was afterwards conveyed, without her knowledge, to the defendant. About ten years after the *feme* arrived at majority, being still *covert*, she gave notice to the defendant of her intention to avoid the deed, and commenced an action to recover possession of the land. Some slight improvements had been made upon the land after the conveyance made by her; but of this fact she was ignorant. She had resided within four miles of the land for two years after arriving at age, and within ten miles of it down to the time of the trial. It was held that she was not estopped to claim the land.

It had been insisted, the court observed, that the deed of an infant could not be avoided in the hands of a subsequent grantee who had purchased without notice of the minority of the original

[1] Miles *v.* Lingerman, 24 Ind. 385 (1865).

grantor. The position could only be sustained upon the doctrine of estoppel, for the grantor could convey no better title than he had; and some act must be done, or there must be some omission, by the minor, after reaching majority, resulting in an injury which would render the avoidance of the conveyance a fraud upon the person in possession. Such was not the present case.

In cases of fraud, unmixed with contract, however, whether by concealment or active conduct, it is pretty well settled, in opposition to the doctrine in Massachusetts, above stated, that a married woman may estop herself to deny the truth of her representation.[1] In the case first cited, it appeared that a contract had been made for the erection of a building by the husband upon the land of his wife, and with her knowledge and approbation. Though knowing what was going on, she did not disclose her interest, or do anything to prevent the work; and the court now held that she was estopped to set up her rights in defence of an action to enforce a mechanics' lien on the building.

In Connolly *v.* Branstler,[2] it appeared that the wife, at a public sale of the land of her husband, announced to the bidders that she would not claim dower against any person who should purchase the premises. It was now held that she was estopped to set up her claim in favor of one who had bought the land on the faith of her declaration.

In Drake *v.* Glover,[3] the jury had been charged that if the defendant, a *fême covert*, was present at a sale of her property by one assuming to act as her trustee, and assented to the sale, she was estopped to deny the trustee's authority; and that if, without being present, she knew of the sale, and did not object to it, she was estopped to deny its validity. The court held the first charge correct, and the second incorrect; and they further said that in case the sale was made by the husband, the silence must be fraudulent, and not the result of marital restraint.[4]

In McCullough *v.* Wilson,[5] the wife joined the husband in procuring a third person to purchase an invalid mortgage of the wife's separate estate; and it was held that both parties were estopped to deny the validity of the mortgage.

[1] Schwartz *v.* Saunders, 46 Ill. 18; Connolly *v.* Branstler, 3 Bush, 702; Wright *v.* Arnold, 14 B. Mon. 638; Davis *v.* Tingle, 8 B. Mon. 539; Jones *v.* Kearney, 1 Dru. & War. 134; Vaughan *v.* Vanderstegen, 2 Drewry, 363; Wright *v.* Leonard, 8 Jur. N. S. 415; *In re* Lush, Law R. 4 Ch. App. 591.

[2] *Supra.*

[3] 30 Ala. 382.

[4] Wilks *v.* Kilpatrick, 1 Humph. 54.

[5] 21 Penn. St. 436.

In a recent case in the Supreme Court of the United States,[1] it was held that there was no estoppel upon a married woman where she had, with her husband, signed an instrument meant for a mortgage of her separate estate, but with blanks left for the mortgagee's name and the amount for which it was to be given, which were afterwards filled and the instrument given by the husband to a *bona fide* lender of money, without knowledge of the facts.

But it is held that an action cannot be maintained at law on a contract made with a *feme covert* who falsely represented herself to be sole at the time; the representation in such case not operating as an estoppel.[2] And a similar doctrine is held as to the false representations of a minor as to his age, though another has been induced to contract with him on the faith of his statements.[3]

In the case first cited, where a married woman had induced the plaintiffs to loan money to her upon a false representation that she was a single woman, and to recover which she and her husband were sued upon a promissory note given by her for the amount, the court, Pollock, C. B., said: "A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is unquestionably responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband sued for it together with the wife.

"If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is not a contract of any kind which a *feme covert* could make, whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve in itself a fraudulent representation of her capacity to sue. Accordingly it has been held in the case cited and so

[1] Drury *v.* Foster, 2 Wall. 24.

[2] Liverpool Association *v.* Fairhurst, 9 Ex. 422.

[3] Johnson *v.* Pye, 1 Sid. 258; S. C. 1 Keb. 913; Merriam *v.* Cunningham, 11 Cush. 40; Burley *v.* Russell, 10 N. H. 184, explaining Fitts *v.* Hall, 9 N. H. 441. But see Kilgore *v.* Jordan, 17 Tex. 341.

much commented upon during the argument,[1] that the wife could not be bound in such a case. It is true that Twisden, J., assigned another reason, viz., that the wife having represented herself to be sole, and induced the plaintiff to marry her, it was a felony in her, and so no action could lie till the felony was tried; but it was said that if the wife had been pardoned, by which that objection was removed, yet it seemed the action would not lie, and the reason was that it sounded in contract."[2]

The doctrine of this case will explain Glidden *v.* Strupler.[3] In that case a married woman has executed an *agreement* to convey real estate. She received one year's interest and a small part of the purchase-money. Possession was taken under the agreement, and improvements made with her knowledge and encouragement. But the court held that these facts did not raise an estoppel against the *feme* to claim the land; referring with approval to a prior case in which it had been held that a married woman was liable only for torts *simpliciter*.[4]

The weight of reason and authority, then, seem to establish the proposition that a married woman may preclude herself from denying the truth of her representations, but only in the case of pure torts; and that if her conduct is so connected with contract that the action sounds in contract, there can be no estoppel.

We have considered the case of infants to some extent, and have seen that an infant cannot be estopped by any course of conduct which would not work an estoppel upon a married woman; that is, he can only be estopped, if ever, in the case of a pure tort. We must now press the investigation farther.

Authorities are not wanting in which it is declared that the doctrine of estoppel *in pais* has no application whatever to infants.[5]

The case of Brown *v.* McCune, above cited, was simply the case of an infant who had falsely represented himself to be of age, and thereby obtained the goods for which the suit was brought. It was of course held that the action could not be sustained; it sounded in contract.

[1] Cooper *v.* Witham, 1 Lev. 247; S. C. 1 Sid. 375.

[2] The same doctrine is held in Keen *v.* Coleman, 39 Penn. St. 299; Keen *v.* Hartman, 48 Penn. St. 497.

[3] 52 Penn. St. 400. See, also, Rumfelt *v.* Clemens, 46 Penn. St. 455.

[4] Keen *v.* Coleman, *supra*. See, also, Wilt *v.* Welsh, 6 Watts, 9; Penrose *v.* Curren, 3 Rawle, 351.

[5] Brown *v.* McCune, 5 Sandf. 224, denied in Eckstein *v.* Frank, 1 Daly, 334; Ackley *v.* Dygert, 33 Barb. 176, 193; Lackman *v.* Wood, 25 Cal. 147, 153; Norris *v.* Wait, 2 Rich. 148. See McCoon *v.* Smith, 3 Hill, 147.

The court, however, say: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age; and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general. It is true that courts of equity have sometimes refused relief, on the ground of fraud or suppression of the parties seeking it, while they are minors; and we do not deem it necessary to dissent from those decisions. At the same time we are clear that the doctrine of estoppel is inapplicable to infants. In nearly every case where litigation has ensued, in consequence of the contracts of infants, such contracts have been made either on the express statement or the tacit assumption that such infants were of full age; and in the latter instance, the suppression of the truth is as base as the falsehood in the former. Yet there is no case to be found in which it has been held that the infant, on such a statement or assumption, was bound by his contract. If he were thereby estopped from denying his majority, the contract would, of course, be adjudged valid and obligatory upon him. A contrary doctrine would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by a suppression of the fact that he was under age, when he was silent on that point, while he knew that the party with whom he was contracting supposed him to be of age. . . . . Then if we hold that an infant, buying merchandise on his statement that he is twenty-one years of age, is bound by his contract, we must next hold that an infant executing a deed or mortgage of his real estate is bound by it, because the act assumed that he was legally capable of executing such an instrument, and he omitted to inform the grantee that his age incapacitated him from so doing."

It will be noticed that the court speaks only of the case of contract, where the party alleging the estoppel is dealing directly with the infant, and omits to make proper inquiry. This is, no doubt, sound law, as we have seen; and this is the extent of the authority of the case.

In the second case cited,[1] it appeared that no one had been influenced by the representations of the infant; and the case is, therefore, not an authority for the statement made in it that an infant can do no act which will work an estoppel upon him.

[1] Ackley *v.* Dygert, 33 Barb. 176.

The third case referred to [1] is hardly an authority, either, for so broad a proposition, for there the court observed that the facts upon which the estoppel of the infant was based had not been proved.

In Norris *v.* Wait,[2] which is a direct authority against the estoppel, the court admit that if an infant be guilty of a fraud and be proceeded against *ex delicto*, he will be answerable.[3]

The authorities, on the other hand, are not few or obscure, which maintain the proposition that if an infant, of years of discretion, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser will hold it against the infant.[4]

We are inclined to think this the correct doctrine; first, by reason of the analogy between this case and that of married women, above considered. We are not aware of any sound distinction between the effect of fraudulent concealment in the one case and in the other, where the infant has attained to years of discretion.

In the second place, the case seems to be embraced by the general principle that infants, like married women, are liable for their pure torts; that is, for torts which are not at the foundation of, or inseparably connected with, contract. Now where an infant, knowing that a person, ignorant of the true title, is dealing with another in respect to his (the infant's) property, conceals his title, and especially if he also encourages the transaction, he is guilty of a wrong, entirely separate and distinct from the contract or sale; because the transaction has been carried on with a third person. Had it been with the infant, the case would have been different; the representation would then have been at the foundation of the affair, and the other party would be bound to know that he was dealing with an infant.

In the one case, it is a representation concerning title, upon which the party may well rely if there are no circumstances casting doubt upon its truth; in the other case, it is a representation concerning age, and the very fact that the party is dealing with a young person is sufficient to put him on inquiry.

[1] Lackman *v.* Wood, 25 Cal. 147.

[2] 2 Rich. 148.

[3] Wood *v.* Vance, 1 Nott & McC. 197.

[4] Sugden, Vendors, 743 (14th Eng. ed.); Overton *v.* Banister, 3 Hare, 503; Esron *v.* Nicholas, 1 DeG. & S. 118; Hall *v.* Timmons, 2 Rich. Eq. 120; Whittington *v.* Wright, 9 Ga. 23; Irwin *v.* Merrill, Dud. 72; Thompson *v.* Simpson, 2 Jones & L. 110; Story, Equity Jur. § 380. See, also, Stokeman *v.* Dawson, 1 DeG. & S. 90; Wright *v.* Snow, 2 DeG. & S. 321; Unity Joint Stock Assoc. *v.* King, 3 DeG. &. J. 63. The cases in chancery, it will be noticed, are more strongly in favor of the estoppel than those at law.

If these views are correct, it is clear that they will apply as well to the case of married women; and it seems to us that the same principles must determine the question of estoppel in both cases.

That the doctrine of privity prevails here was determined in Wood *v.* Seely.[1] In this case one Shoemaker, under whom the plaintiff claimed, had been induced by the defendant to purchase and pay the full value of certain land upon the representation that the defendant had no interest in the land. It was now contended on behalf of the latter, in support of a claim of interest in the land, that the estoppel was personal, and that Shoemaker alone could avail himself of it; but the court held otherwise.

Denio, C. J., in delivering judgment, said: "I am of opinion, on the contrary, that the plaintiff, or the owner of the land under Shoemaker's title, holding under mesne conveyances from him, is equally entitled to avail himself of the equitable bar. In some of the cases referred to, relief was given to the grantee of the party defrauded. Such was the case of Town *v.* Needham.[2] In Jones *v.* Powell,[3] where a right of dower was relieved against, on the ground that a collateral compensation had been made by the testamentary trustees of the husband, the party to whom the relief was adjudged was a grantee of the immediate purchaser. Estoppels by record and by deed, as is well known, run in favor of, and against, the privies in estate of the immediate parties to the estoppel, as well as for and against the parties personally; and I see no reason why estoppels *in pais* should not be within the rule, as they clearly are within its principle. Cases of dedication often rest upon the principle of estoppels *in pais;* it being considered fraudulent on the part of one dedicating his land to public uses to retract, to the prejudice of parties who have purchased on the faith of such dedication. It has frequently been held that the estoppel attaches itself to the land, and can be asserted on behalf of the grantee of the immediate purchaser."[4]

The doctrine is illustrated also in Parker *v.* Crittenden.[5] In this case the plaintiff bought a hack in the possession of a third person, as belonging to him. The real owner was present, and assented to the sale. Subsequently it was attached as his, in the

[1] 32 N. Y. 105.
[2] 3 Paige, 545.
[3] 6 Johns. Ch. 194.
[4] Hills *v.* Miller, 3 Paige, 254; Watertown *v.* Cowen, 4 Paige, 510; Child *v.* Chappell, 9 N. Y. 246.
[5] 37 Conn. 148.

hands of the plaintiff, who now brought replevin. The court held him entitled to recover.

The defendants, it was remarked, by claiming through the owner under the attachment, were privies in estate with him, and bound by the same estoppel.

If the representation, however, has been procured by fraud, there will be no estoppel upon the party making it, it would seem, though he made it with the full intention that it should be acted upon.[1] In Wilcox *v.* Howell, just cited, an action was brought to foreclose a mortgage, executed by the defendant to one Picard, and by him assigned to the plaintiff. It was proved that the mortgage had been procured by fraud; but it also appeared that the defendant had given a certificate, which was delivered to the plaintiff with the mortgage, that the security had been given "for a good and valid consideration to the full amount thereof, and that the same was subject to no offset or defence whatever." But it appeared that this certificate had also been procured by the mortgagee by fraud, and that it was not given to induce the plaintiff to buy the mortgage or to enable the mortgagee to negotiate it; on the contrary, it was given with the understanding that he should not negotiate.

The court of course held that the defendant was not estopped to deny the truth of the representation made in the certificate. But suppose it had been proved that the certificate had been given to the mortgagee in the presence of the assignee, and with the full intention that the latter should act upon the representation, and that the assignee was ignorant of the fraud in procuring the certificate, would the mortgagor then be estopped to deny the truth of the statement made? It would seem not; for the estoppel rests on the assumption that the party against whom it is alleged has acted freely and with full knowledge of the circumstances; and this assumption seems to fail where the mortgagor has been deceived into the belief that the mortgage has been given for value. The security may have been given for some supposed liability which future events may have shown, as matter of fact, did not exist, but which at the time he may have had every reason to believe was real and undischarged. If the mortgagee in such case has procured the certificate or statement by a fraudulent sup-

[1] Wilcox *v.* Howell, 44 N. Y. 398; S. C. 44 Barb. 396. See Roe *v.* Jerome, 18 Conn. 138; Holden *v* Putnam Fire Ins. Co., 46 N. Y. 1.

pression of the facts, the mortgagor, in making the representation, acts in ignorance, and should not be bound.

So, too, if the transaction itself has been brought about in mutual fraud, the party claiming the benefit of the estoppel will fail.[1] The case first cited was *assumpsit* for goods and moneys, to which the defendant pleaded a release. The plaintiff replied that the release had been obtained by fraud. There was a rejoinder, *de injuria*. It appeared that the defendants, being indebted to various parties, — the plaintiff among others, — had entered into a composition deed with them. The plaintiff refused to join unless the defendants would agree to give him a higher rate than the rest in the dividends; and this was agreed upon without the knowledge of the other creditors. As an inducement to this arrangement, the defendants had stated to the plaintiff that no such preference had been given to any one else, and this was false. The plaintiff had received securities of the defendants for the agreement. It was held that the plaintiff could not allege the deception.[2]

"Here," said Erle, J., "the plaintiff, having received the composition and the value of the preference, which was a fraud upon the other creditors, is seeking to gain a further exclusive advantage to himself, also in fraud of them, by suing for the balance of his original debt, after allowing for the composition and the value of the preference, and claims to avoid his release on the ground that he was induced by the defendants to believe that he alone was fraudulently preferred, whereas some other creditors had also obtained some unjust advantage. . . . . But a deed is not to be avoided on the ground of a fraudulent misrepresentation, unless the matter misrepresented was a material inducement to the execution of the deed; in other words, unless the matter was such as in case of a simple contract would be substantially the consideration of the contract. Here the representation relied on is not of this nature. The exclusion of others from a preference is no direct advantage to the plaintiff; and, the whole stipulation for a preference being a fraud on the part of the plaintiff towards other creditors, no part of it can be legally relied on by him as forming a material inducement for his deed. It could not form any part of a legal consideration."

The estoppel will also be strictly limited to the representation made.[3] In the case cited, a sheriff, having a writ commanding him

[1] Mallalieu *v.* Hodgson, 16 Q. B. 689; Goodall *v.* Lowndes, 6 Q. B. 464.

[2] Wightman, J., dissenting.

[3] Dunston *v.* Paterson, 2 Com. B. N. S. 495.

to take the body of a certain person, took the plaintiff, upon a representation by her that she was the person named in the writ; but he retained her in custody after notice that she was not the party intended. The court held that though the plaintiff might be estopped by her conduct from suing the sheriff for the original arrest, she was not estopped to maintain an action against him for retaining her in custody after notice that she was not the person named in the writ.

The case of Tilton *v.* Nelson[1] is important as showing what the representation embraces, and how far the estoppel extends. In this case, one Marks, the plaintiff's ancestor, having mortgaged certain premises to loan-commissioners, and being unable to pay the debt, and a sale being about to take place, requested a certain bank, which held a judgment against him, to buy the land and, by selling the same in parcels, pay off the judgment and the purchase price of the land under the mortgage sale. This was done, and Marks attorned to the bank, and then to the purchasers of the various parcels, and continued to act upon the arrangement during his lifetime; and his widow subsequently recognized the validity of the transaction. The court held the plaintiff estopped to dispute the validity of the proceedings of the commissioners, and thereby claim the land as against the bank and its privies.

Mr. Justice Strong, at the special term: "There was not any direct assertion that, so far as related to the proceedings of the commissioners, all was right. But the rule is very clear and proper that one is concluded, not only by what he does or says, but by the natural and reasonable inference from his declarations or conduct. Were it otherwise, a party might mislead another to his great prejudice by artful simulation. The inferences should, of course, be natural, and not far-fetched. Where advice is given as to future conduct, the counselled has a right to suppose that his adviser has not only the requisite knowledge of the facts which would render the proposed measure expedient, but that he is not aware of any circumstance that would operate prejudicially. In this case, the request that the bank should purchase at the commissioners' sale clearly indicated that their proceedings had been regular, and that the resulting title would be valid. It may be, as the counsel for the plaintiff contended on the argument, that this involved a legal

[1] 27 Barb. 595.

inference. And I am inclined to think, with him, that the expression of an opinion upon a matter of law does not conclude the party making it, although it may influence action towards himself, or relative to his affairs, by another.[1] When the facts are known, every one must abide by his own inferences. But when the facts are not known, the assertion of a general conclusion, although it may involve legal questions, includes all the facts necessary to sustain it, certainly all which may reasonably be supposed to be within the personal knowledge of the informant. Here the advice would have been wrong, had not the proceedings of the commissioners been in fact such as the statute required. I think I am safe in concluding that the advice given by Marks in this case, under all the circumstances, clearly indicated a knowledge of the proceedings of the commissioners in reference to the proposed sale of the property, and was in effect an assertion that they had taken all the requisite preliminary steps to render such sale effectual; that it influenced the bank, through its agent, to make the purchase; and that it would be prejudicial to the bank, or its privies, to allow the title, which was acquired mainly through such advice, to be controverted. It is precisely under such circumstances that the doctrine of estoppel *in pais* does and should apply. . . . . It has been held in many cases that a party is bound by his silence when in fairness he ought to have spoken; as in the familiar instance where one erects an expensive building on the land of another, near their division line, and the owner, seeing it, makes no objection; or where one sees a counterfeit note, signed with his name, sold to another without disclosing the forgery; or where the actual owner of goods stands by and allows another to treat them as his own, by which means a third person is induced to purchase them *bona fide*, the former cannot recover them from the purchaser."

This judgment was affirmed at the general term. Emott, J., speaking for the court, now said: "It might be material, in some aspects of the case, to know precisely how and when the irregularity occurred which the plaintiff relies upon to defeat the defendant's title, but which the defendant contends that Marks, the mortgagor, must be presumed to have known, and has estopped himself and his heirs or assigns from asserting. But it is probably sufficient to dispose of the case to assume, as both parties seem to

[1] See Brewster *v.* Striker, 2 Comst. 19; Sexey *v.* Adkison, 40 Cal. 408.

have done, that by some irregularity or failure of the loan commissioners the title which they could and did give to the bank at the sale under Marks's mortgage was rendered defective. The answer was that Marks knew all the facts and circumstances attending the sale, but not that he knew or believed that the title was imperfect. If, however, he knew all the facts, then his ignorance, if he was ignorant of his rights to any extent, was of the rules or principles of law which would control the case. For instance, he may have been aware, as a matter of fact, that some of the proceedings, or the sale itself, had been by one commissioner only, but he may have been ignorant that this would affect the validity of the title. And thus the question is presented whether ignorance of the law will prevent the application of the rule of equitable estoppel; for I think this is a fairer statement of the question than to put it, as was done by the plaintiff's counsel before us, whether the acts and assertions of Marks were not the mere assertion of a conclusion of law. The conduct of Marks cannot be considered as merely the statement of an opinion upon the known facts of the case. It was a course of conduct by which the Westchester County Bank was directly requested and induced to take the deed under which the defendant claims. Marks is not alleged to have expressed any opinion upon the validity of the acts of the commissioners; but knowing precisely what those acts were, he encouraged and induced the bank to buy his lands in the proceeding of which they were a part. He may or may not have been ignorant of the rules of law applicable to the case. It would be difficult, if not impossible, especially at this length of time, to show whether he really understood his rights correctly in this respect or not. But whether he did or not, I think when he or those privy to him in blood or estate seek to controvert the title thus made, and to avoid the estoppel alleged against them, they encounter two principles of law which were distinctly applied by Chancellor Kent in the case which I have cited,[1] — a case in some respects stronger for the legal title than the one before us, — and where the chancellor expresses the opinion that the defendant had really been ignorant of his legal rights. The first of these principles is, that when a party procures or even acquiesces in the disposition of his property by another under color of title and pretending to title, he shall be bound by such disposition, and shall

[1] Storrs *v.* Barker, 6 Johns. Ch. 166.

be presumed to know the law, so far as it is applicable to the case. The other is, that even if he shows that he was really ignorant of the law, and acted in that ignorance, still the maxim *Ignorantia legis neminem excusat* will apply in favor of the other party."

In Duncan *v.* Stewart,[1] an action was brought by Stewart as indorsee of a promissory note of which the defendants and appellants were makers. The defendants proved, at the trial, that the note had been given for the price of a slave which one of the defendants had purchased at a public sale made by Davis, the payee of the note, as administrator of the plaintiff, under an order of court. They further proved that letters of administration had been taken out by Davis upon the estate of the plaintiff, who had not been heard from for eight or ten years, and who was supposed to be dead; that Stewart subsequently appeared, made inquiries after his property, and received the note in question from Davis. The plaintiff had judgment.

One of the positions taken by the defendants on the argument, with the answer of the court, was thus stated by Goldthwaite, J.: "A technical principle is invoked in behalf of the appellants, and it is urged that, as the record shows that Davis, the payee, took out letters of administration, and made the sale in his representative capacity, and the note was given upon this sale, Davis is concluded from denying that he was administrator, or from recovering in an action brought in his own name upon the contract, as if made to himself personally; that the appellee, as his privy by assignment, occupies no better position, and the note in this respect must be regarded as assets, and therefore no title or right of action could be derived from the assignment. Conceding, as to this argument, that the administrator could not, by virtue of his authority, assign a note which was assets of the estate he represented, so as to invest the assignee with the legal title, the question is, whether Davis, upon the facts as we have stated them, would, in a suit upon the note, be concluded from showing that it was not assets. As to the proceedings of the court which granted the letters and ordered the sale, as there was no jurisdiction, these acts amount to nothing, and Davis would not be bound by them, any more than a plaintiff would be bound by a judgment in his favor, rendered by a court which had not power to take cognizance of the case. But is he concluded, without reference to the action of the court, be-

[1] 25 Ala. 408.

cause he made the sale in his representative character? It is true, that where one assumes to act in a particular capacity, he will be estopped from denying the position he has taken, when such denial will operate to defeat rights attaching to the contract itself, — the law regarding his assumed character as a real one, so far as it enters into it; but we do not understand the doctrine of estoppel to extend to matters affecting the remedy only, entirely foreign to and disconnected from the contract, or the character with which it was entered into by the contracting parties. Here the rights of the appellants, growing out of the purchase, have no legitimate connection with, and are not in the slightest degree affected by, the fact whether it was assets or not. They can assert all the rights arising from the contract by way of defence precisely the same as if the note was assets and had not been transferred, and can avail themselves of every equity against the assignee equally as against the assignor. As there was nothing that forbade the plaintiff below from showing that the note was not assets, and as the necessary proof was made upon this point, the assignment invested Stewart with the legal title."

The estoppel may also arise, as we have intimated, from passive conduct. The doctrine of Pickard *v.* Sears was soon after brought before the same court.[1] The case referred to was an action of trover for goods, the fittings and furniture of a public house. The plaintiff, being owner of the goods, demised them to one Durham, who thereupon became tenant of the house to third parties under an agreement, made in the plaintiff's presence, giving his landlords a lien on the goods. The landlords, however, did not know that the plaintiff was owner of the property, nor did they know of the arrangement with Durham; and nothing was said or done to apprise them of these facts. Subsequently Durham sold the fittings and furniture to the defendant without the plaintiff's knowledge, and the defendant purchased in good faith, and in ignorance of the plaintiff's title, and thereupon became tenant under Durham's landlords. The court held that the action could not be maintained.

Lord Denman, C. J., said: "Pickard *v.* Sears was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract

[1] Gregg *v.* Wells, 10 Ad. & E. 90.

on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

Silence was held to have worked an estoppel in the case of Niven *v.* Belknap.[1] This was a bill *quia timet*, under the following circumstances: The plaintiff, Niven, had applied to the defendant, Belknap, to purchase a farm, then in the possession of Belknap, and was informed by him that a third person, who held a mortgage from him (Belknap) upon the farm to nearly its value, had the disposal of the property. The defendant then went with the plaintiff to the mortgagee, and an arrangement was made between him and the plaintiff, in the presence of the defendant, for the absolute purchase of the farm, and the mortgagee thereupon executed a conveyance in fee to the plaintiff, who afterwards took possession as owner, and made considerable improvements on the land. Subsequently the defendant, the mortgagor, made an absolute conveyance of the land to his son, who was a neighbor of the plaintiff; and the father and son were now proceeded against, with a prayer that they might be compelled to discover any pretended title to the land, and required to renounce the same, or be perpetually enjoined from asserting it. The bill was sustained by the Court of Errors.

The opinion of the court was delivered by Thompson, J., who observed: "Though it does not appear positively from this testimony that Belknap took any active agency in this negotiation, yet his presence and silence are equally efficacious and binding upon him, if the complainant was thereby misled and deceived. There is an implied as well as an express assent; as where a man who has a title, and knows it, stands by and either encourages or does not forbid the purchase, he, and all claiming under him, shall be bound by such purchase.[2] It is very justly and forcibly observed by a writer on this subject,[3] that there is a negative fraud in imposing a false apprehension on another by silence, where silence is treacherously oppressive. In equity, therefore, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent."[4]

[1] 2 Johns. 573.
[2] Fonbl. 161.
[3] Roberts, Frauds, 130.
[4] See, also, Hall *v.* Fisher, 9 Barb. 17, 31; Parkhurst *v.* Van Courtland, 14 Johns. 15, 43; Malin *v.* Malin, 1 Wend. 625, 666;

Silence was held to have worked an estoppel in the late case of Hope *v.* Lawrence.[1] In this case the defendants were instructed, according to the plaintiff's testimony, to sell certain gold of his in their possession if it reached a premium of 217 per cent on a certain day. It did reach that point, and was very firm at the time, and the defendants thought best not to sell under the circumstances, and so stated, in answer to the plaintiff's inquiry on the next day, on the morning of which gold had advanced to 220. Two or three days later, gold having in the mean time fallen below 217, the plaintiff wrote the defendants, "I took a note of your reply [above mentioned], and determined to wait the future course of the market before writing to you." The price of gold kept falling for several days, and the defendants sold it at 207¾ premium. The plaintiff now sought to hold the defendants for their failure to sell at the time first mentioned. The court, however, held that he was estopped by his conduct.

"The effect of the omission of the plaintiff," said Leonard, P. J., "when he inquired the next day of the defendants if they had sold, to notify them that his instructions were absolute to sell[2] if the price reached 217, was to put them into a feeling of security, and involve them in further loss, if the price of gold continued to decline. The whole risk of the market was on them, while the plaintiff enjoyed the advantage to accrue in case the price advanced up to or above the limit of 217. The plaintiff was aware of this, if he had given absolute instructions to sell at a price which the market had touched. His letter shows that he knew precisely how the

Adams *v.* Rockwell, 16 Wend. 285, 317; Otis *v.* Sill, 8 Barb. 102; Chautauque Bank *v.* White, 6 Barb. 589; Railroad Co. *v.* Dubois, 12 Wall. 47; Rubber Co. *v.* Goodyear, 9 Wall. 788. In Chapman *v.* Chapman, 59 Penn. St. 214, Agnew, J., says: "As to Gansamer there was no such positive act, but there was a silence so suggestive, so pregnant with ill to him, the court was justified in leaving its effect to the judgment of the jury. Silence will postpone a title when one should speak out, when, knowing his own right, one suffers his silence to lull to rest, instead of warning to danger; when, to use the language of the books, silence becomes a fraud. Such a silence, though negative in form, is operative in effect, and becomes suggestive in the seeming security it leads to. He who is led by such a silence, ignorantly or innocently, to rest upon his title, believing it to be secure, and to expend money and make improvements upon his property without the timely warning he should have had to dispel his illusion, will be protected by estoppel against recovery. Crest *v.* Jack, 3 Watts, 238; Keeler *v.* Vantuyle, 6 Barr, 250; Commonwealth *v.* Moltz, 10 Barr, 531; Woods *v.* Wilson, 37 Penn. St. 383; Miranville *v.* Silverthorn, 48 Penn. St. 149." See, also, Lawrence *v.* Luhr, 65 Penn. St. 236.

[1] 50 Barb. 258 (1867).

[2] The defendants claimed that the instructions were not positive.

price had advanced, and that he intentionally remained silent to see how the market would fluctuate after that. Had he then stated the position now claimed in this action, the defendants might have closed the gold transactions at 215½, the then market price, being only 1½ per cent below the plaintiff's limit, and involving a loss of $75 only. What the market price was on the 30th of January, when the plaintiff advised the defendants of his claim on them, does not appear; but on the 4th day of February, when it was sold, the price appears to have fallen to 207⅛, the price realized. The defendants, by the silence of the plaintiff, had no opportunity to elect whether to hold or to sell the gold of the plaintiff, then in their hands, at their own risk as to the price, without the smallest chance of realizing any benefit for themselves, if the position of the judge at the trial is correct. But, in my opinion, what has been remarked above, as to the practical effect upon the rights of the defendants, arising out of the silence of the plaintiff, when he should have spoken, establishes that the plaintiff is estopped from inflicting upon the defendants any damage for the subsequent depreciation in the price of gold coin. The plaintiff should be held to assume all the risk of further depreciation, when he saw that the defendants were resting under the impression that they had missed the market by an error of judgment. He asked the reason why the defendants had not sold, and was told that the market looked strong when it was about 217, and thereupon they did not sell. It was evident to the plaintiff, from this answer, that the defendants were acting on their discretion."

Questions concerning the right of insurance companies to set up defects in the preliminary proofs of loss are frequent, and often depend upon the conduct of the company.

In Blake *v.* Exchange Mutual Insurance Company,[1] the defendants, being sued for a loss by fire, raised an objection to the sufficiency of the preliminary proofs; but the court decided that they had estopped themselves from making the objection.

In the court below, the judge instructed the jury that the preliminary proofs might be waived or the defendants estopped to avail themselves of defects in them otherwise than in writing indorsed on or annexed to the policy; that if the by-laws and conditions of insurance required certain preliminary proofs and notices to be given in a certain manner, and with certain particulars and

[1] 12 Gray, 265.

details, and certain preliminary proofs and notices were given, not containing all the formal requisites, and, after receiving such proofs and notices, the defendants' president and secretary examined the premises, and had interviews with the plaintiff before the expiration of the time for giving said notices, and neither they then, nor the defendants afterwards, made any objection to the form or sufficiency of the preliminary proofs while any defects therein might have been remedied, and put their refusal to pay on other and distinct grounds, then such conduct might be considered a waiver of any defects in the preliminary proofs, or so far an estoppel that the defendants should not be allowed to avail themselves thereof, notwithstanding the provisions of the policy. This instruction was sustained on appeal.

"There can be no doubt," said Thomas, J., speaking for the court, "that the conduct of the defendants would amount to a waiver, except for the last clause in the policy, by which it is 'agreed and declared by the parties aforesaid, that no condition, stipulation, covenant, or clause hereinbefore contained shall be altered, annulled, or waived, or any clause added to these presents, except by writing indorsed hereon or annexed hereto by the president or secretary, with their signatures affixed thereto.' There is a previous provision that in case of loss the money is 'to be paid within ninety days after notice, proof, and adjustment thereof in conformity to the conditions annexed to the policy.' The provisions for notice and proofs of loss are contained in the twelfth of the by-laws. The entire by-laws are printed under the heading, 'Conditions of Insurance.' The policy is declared to be made and accepted in reference to the conditions thereto annexed, which are made part of the policy. How far the provisions as to the form of the notice and proofs of loss, after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss,

the plaintiff sent to the defendants certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so, if they proceeded to negotiate with the plaintiff without adverting to the defects, if, still further, they put their refusal to pay on other and distinct grounds, they are, upon familiar principles of law, estopped to set up and rely upon the defective notices. The law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary.[1] If the defendants relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question was not open."

In Hoxie *v.* Home Insurance Company,[2] which was an action on a policy of marine insurance, the court below had been requested to charge the jury that if, after the partial loss, the defendants, with knowledge *or reasonable means and opportunity of ascertaining the facts*, on consideration thereof elected to treat the policy as in force and continue the risk, and retain or appropriate the entire premium for the whole period, and the plaintiff had thereby been induced to rely on the policy as in force, the defendants would be estopped from claiming that the policy did not attach because of the unseaworthiness of the vessel.

The Supreme Court said: "Irrespective of the alternative of 'reasonable means and opportunity of ascertaining the facts,' that request was a legal and proper one. If the defendants, knowing her to have been unseaworthy at the inception of the risk, elected to continue the risk and take the entire premium, and thereby induced the plaintiff to rely on the policies as in force, they would

[1] Vos *v.* Robinson, 9 Johns. 192; Etna Fire Ins. Co. *v.* Tyler, 16 Wend. 401; Heath *v.* Franklin Ins. Co., 1 Cush. 257; Clark *v.* New England Mutual Fire Ins. Co., 6 Cush. 342; Miller *v.* Eagle Life Ins. Co., 2 E. D. Smith, 268; S. C. 1 Big. 375.

[2] 32 Conn. 21.

have been as matter of law, and justly, estopped. Such is the doctrine of the case of Frost *v.* Saratoga Mutual Insurance Company,[1] and the other cases cited by the plaintiff.[2] And if by the introduction of the alternative, 'or after reasonable means and opportunity of ascertaining the facts,' the eminent and lamented counsel who tried the case for the plaintiff below meant nothing more than that when the information contained in the surveys was offered to the defendants, they, deeming the vessel *then* fully repaired and seaworthy, chose to waive inquiry and continue the risk, whatever the fact respecting seaworthiness may have been at the inception of the risk, and acted and induced the plaintiff to act accordingly, perhaps the request might be sustained. But the charge of the judge embodies a very different proposition. The import of it is, that an injury having been sustained, confessedly by her unseaworthiness or the perils of the sea, if the defendants had means and opportunity for ascertaining whether by reason of unseaworthiness or not, *they were bound then to inquire;* and if they did not, and paid the damage and took the benefit of the premium note, — or, in other words, acted without inquiry, as if there had been no breach of warranty, — they waived all right to the benefit of such warranty, if they should afterwards learn that the vessel was unseaworthy at the inception of the risk, and was ultimately lost in consequence of it.

"That proposition cannot be sustained. A waiver is the intentional relinquishment of a known right, and there must be both *knowledge* of the existence of the right, and an *intention* to relinquish it. These defendants were entitled to presume, and rely on the presumption, that the plaintiff knew the condition of his vessel when he applied for the insurance, and that he concealed nothing, but made an honest contract. 'And when there is no proof either way, seaworthiness is to be presumed.'[3] They were not, therefore, bound to inquire, and, having no actual knowledge, they waived nothing. Besides, the plaintiff claimed that the injury resulted from the peril of the seas. If it resulted from unseaworthiness which existed at the inception of the risk, he must be presumed to have known it, and, therefore, to have been guilty of

[1] 5 Denio, 154.

[2] Sheldon *v.* Connecticut Mut. Life Ins. Co., 25 Conn. 207; Bouton *v.* American Mutual Life Ins. Co., Ib. 542; Goit *v.* National Ins. Co., 25 Barb. 190. So Miller *v.* Mutual Benefit Life Ins. Co., 31 Iowa, 216.

[3] Shaw, C. J., in Capen *v.* Washington Ins. Co., 12 Cush. 517, 535.

fraud in concealing the fact and making the claim for the loss, and should be estopped from setting up that claim of waiver. We know of no authorities or analogies to sustain this part of the charge of the court."

The case of Cambridge Institution for Savings *v.* Littlefield [1] is important in this connection. It was an action by the indorsees of a promissory note against the maker, to which the defendant pleaded his discharge in bankruptcy. It appeared that before the note was transferred to the plaintiffs, one Wood applied to them for a loan of money, and that the plaintiffs, at Wood's suggestion, took the note and mortgage of the defendant as security; Wood guaranteeing the note. The intention, at first, was to take a mortgage from Wood. The defendant was present during the transaction, and did not disclose the fact that he had been discharged in bankruptcy from liability on the note. The plaintiffs now contended that the defendant was estopped to set up his discharge; but the court held the defence proper.

Having remarked that it was essential to such an estoppel that one party has been induced by the conduct of the other to do or forbear doing something which he would not or would have done, as the case might be, but for such conduct of the other party, Dewey, J., speaking for the court, said: "The application for a loan was by Wood. It was, so far as we can perceive, a loan to be made on Wood's responsibility, accompanied by a mortgage of certain land to secure the payment. The party lending the money did not originally stipulate for Littlefield's personal liability. When Littlefield's note was offered as the basis of the mortgage, some objection was made to it, and thereupon Wood's guaranty was given, and the mortgage transferred to the plaintiffs and accepted by them. The plaintiffs thus received Wood's security and a valid mortgage of real estate, all equally valid whether Littlefield's personal liability had or had not been released by his discharge in bankruptcy. If it be said that the guaranty of Wood was not as good security as his promissory note, that objection equally exists whether the note of the defendant was valid or invalid as against the plaintiffs. The silence of the defendant, at the time of making the loan to Wood, did not change that part of the arrangement; and the guaranty of Wood is equally binding on him whether the defendant is or is not liable. Had the plaintiffs received the note

[1] 6 Cush. 210.

from the defendant as their sole security, or as that upon which they substantially relied, and parted with their money on the strength of it as security, the silence of the defendant as to his discharge from all liability for the payment of it might have been strongly urged against him, upon his setting up such discharge as a bar. But, independently of a personal liability of the defendant, the plaintiffs received a valid and valuable security for their money. The note was a good instrument for the foundation of a mortgage, and equally so whether the personal liability of the defendant to pay the note existed or not. So, too, the guaranty of Wood was a legal and valid contract, irrespective of the personal discharge of the defendant by his discharge in bankruptcy.

"The case is not, therefore, the bald case of a party standing by and silently permitting a chose in action, to which he is a party, to be taken as a valid debt, and money lent thereupon; he knowing at the same time that there is a secret taint as to the same that renders it wholly worthless, and leaves the party taking it without any security for the repayment of the loan. On the contrary, the defendant might reasonably suppose that the plaintiffs relied principally upon the mortgage and the guaranty of Wood as their security for the money lent, and it has not been shown or suggested that the land mortgaged and the guaranty of Wood are not ample security for the loan."

A question of this kind arose in the recent case of Corning *v.* Troy Iron and Nail Factory.[1] The action was brought to restrain the defendants from diverting the water of a stream running along the land of the plaintiffs, and to compel the defendants to restore the water to its natural channel. It appeared that one Defreest, under whom the plaintiffs claimed, while owning and using a water privilege on the stream in question, had assented to the erection by the defendants of works and dams on land leased by him to the defendants, by which the waters of the stream were diverted, and urged the completion of the works intended for this purpose, and expressed his fear that the defendants had not the means to complete them. Defreest wished the completion of the works from an expectation that the result would be a large increase in population, which would raise the value of his land; and the claim of the defendants to the use of the water so diverted was adverse to Defreest. It was held that the plaintiffs were not estopped.

[1] 40 N. Y. 191 (1869).

The court said that the answer to the position that the plaintiffs were estopped was, that the defendants were in full possession and control of the creek and land under the lease, and that during the continuance of the lease Defreest had no right to object to any use of the stream by the defendants except such as worked an injury to the reversion; and this the diversion, during that period, could not have done. The defendants, further, knew at the time that upon the expiration of the lease their right to divert the water would cease, and there was no pretence of any other right except under the lease; and the defendants were not, therefore, in any sense misled or deceived as to the right of diversion by anything done by Defreest.

In delivering judgment, in the Supreme Court, in this case[1] (which judgment was affirmed on appeal[2]), Hogeboom, J., said: "It does not now occur to me that an estoppel can ever arise, founded upon an omission to object to an act or declaration, when such act was perfectly justifiable, or such declaration perfectly true. It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, or hears a false and injurious declaration made affecting his rights, and does not protest against it, that he is regarded as tacitly acquiescing in the propriety of such act, or the truth of such declaration, and shall not be permitted thereafter to question it, when such a course would work damage to an innocent party."

A somewhat singular case of estoppel of this kind arose in the recent case of Ford *v.* Williams.[3] It appeared that the defendant, an attorney in an execution, refused to disclose to the plaintiffs (who were interested in the matter) at whose request he acted in directing the execution sale; and that the plaintiffs thereupon threatened him with suit, to which the defendant replied that they might sue as soon as they pleased. In an action of trespass for the goods sold under the execution, he was now held estopped to deny that he had acted on his own responsibility.

In delivering the opinion of the court, Denio, J., observed: "The evidence on the present trial was very full to show the defendant to have directed the seizure and sale of the property; and the rules of law as to what kind of participation in a trespass will implicate a person in the wrong were correctly laid down by the

[1] 39 Barb. 311, 324.
[2] 40 N. Y. 191, *supra*.
[3] 24 N. Y. 359 (1862).

judge. But the defendant objects to the ruling in which it was stated that the fact that the defendant refused to disclose on whose behalf he was acting, and told the plaintiffs to sue him, estopped the defendant from denying that he directed the sale of the property. I think the case does not raise such a question. As I understand it, the charge was, that if the defendant, besides directing the sale and promising to indemnify the bidder, refused to name his principals and invited the plaintiff to sue him, he would be estopped from denying his complicity. The substantial correctness of such an instruction cannot be doubted. But if the charge were such as the objection assumes, I think it would be right. The defendant certainly issued the execution and attended and countenanced the sale. It might be that, conceding these facts, he was not a trespasser, and that the officer and the plaintiffs in the execution were the only parties implicated, as we held when the case was here before;[1] yet if he acted officiously, and beyond the scope of his duty as an attorney, or if he directed the execution to be levied on this particular property, without instructions for that purpose by his clients, he would be liable. The present plaintiffs, after the sale, required an explanation on that point, which, according to the testimony, he refused to give, taking the responsibility upon himself by inviting the plaintiffs to sue him. This, if the testimony were believed, would be a ratification on his part of the act of selling the property, which would render him subject to its consequences; and, in consequence of that declaration, if the plaintiff sued him instead of the other parties liable, he would be estopped from insisting upon a defence which, if allowed, would subject the plaintiff to costs for acting on his invitation."

Silence was held a ground of estoppel in the recent case of Gregg *v.* Von Phul.[2] The case was this: The parties had entered into articles of agreement by which Von Phul, the plaintiff, agreed to sell and convey to Gregg certain premises in Peoria. Von Phul had covenanted that he would convey the premises by deed in fee "with full covenants of seizure and warranty, on or before the first day of March, 1857," and Gregg agreed to execute his three promissory notes for the sum to be paid. On the *4th of May*, 1860, Von Phul's agent tendered a deed to Gregg, and demanded, not the notes, but the money due on the contract of purchase. This deed covenanted that Von Phul was "lawfully

[1] 13 N. Y. 577.

[2] 1 Wall. 274.

seized" in fee of the premises, and that he would "warrant and defend the title" against all persons. Gregg looked at the deed, and made no objection to it, but stated that he was not ready to pay the money, and handed back the instrument. Von Phul now brought an ejectment for the premises, of which Gregg had taken possession under the contract of purchase; and the defence was, that the deed tendered did not correspond with the one agreed upon. But the court held him estopped to set up such a defence.

"In the view we take of this case," said Davis, J., for the court, "it is not important to determine whether the deed tendered was such a one as Von Phul was bound to make, or Gregg obliged to receive. If the deed was justly liable to objections, they should have been stated. Gregg is estopped now, on the most obvious principles of justice, from interposing objections which he did not even name when the deed was tendered and the money due on the contract demanded. If the deed was defective and the defects pointed out, *non constat* but they could have been obviated. There is nothing in the evidence even tending to show that Von Phul did not act in good faith. The very silence of Gregg was well calculated to influence the conduct of Von Phul, and to convince him that the want of the money was the only reason Gregg had for declining to perform the contract. And it would be against good conscience to permit Gregg now to avail himself of objections which his failure to make when the deed was tendered must have induced Von Phul to suppose did not exist."

Further on in the opinion, the ground of the decision is stated still more plainly. "No one is permitted to keep silent," said the learned judge, "when he should speak, and thereby mislead another to his injury. If one has a claim against an estate, and does not disclose it, but stands by and suffers the estate [to be] sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser.[1] And justly so, because the effect of his silence has actually misled and worked harm to the purchaser. And in this case the silence of Gregg concludes him. He cannot now take exceptions to a deed which he failed to perceive when it was tendered to him, or, if he knew them, failed to disclose."

In Shaw *v.* Spencer,[2] it appeared that a certificate of stock in a

[1] Hill *v.* Epley, 31 Penn. St. 331, 334; Breeding *v.* Stamper, 18 B. Mon. 175.

[2] 100 Mass. 382.

corporation, expressed to be in the name of "E. Carter, trustee," had been fraudulently pledged to the defendants as a security for the debt of a firm of which he was a member, and that the certificate had been received without inquiry. One of the beneficial owners of the stock, under the trust, Q. A. Shaw, on learning this fact, gave notice to the defendants, on behalf of himself and the other trustees (by whom the stock had been transferred to the plaintiff, and by him to Carter in trust to secure acceptances of Q. A. Shaw), that the stock was his, that he had never received value for it, and requested them to hold it subject to his order. Soon afterwards the defendants paid an assessment on the stock to Q. A. Shaw, as treasurer of the corporation, in the presence of the plaintiff, who was president of the same; and the plaintiff made no demand for the stock. Subsequently the plaintiff notified the defendants that the stock was his property, and requested them to deliver to him the certificates, with such indorsements as would enable to obtain it, and on refusal filed the bill in this case. The defendants now contended that the plaintiff was estopped; but the court held the contrary.

Mr. Justice Foster, who delivered the opinion of the court, said that by receiving the money which the defendants voluntarily paid, the Messrs. Shaw, the treasurer and the president of the company, had not induced them to change their position, or deprived them of any rights. They had no reason to believe, when the payment was made, that either the plaintiff or Q. A. Shaw intended to abandon their claim or to waive their rights. Q. A. Shaw could not have done so by any act of his own; and the plaintiff had only omitted to object to the payment of the assessment. The payment was evidently made to fortify the position of the defendants; it was for their own benefit and protection, and they had not been deceived or induced to the act by any conduct of the Messrs. Shaw. "A waiver," said the learned judge, "is an intentional relinquishment of a known right."[1]

If the owner of an estate stand by and see another expend money upon an adjoining estate, the latter relying upon an existing right of easement in the other estate, without which such expenditure would be useless, and do not interpose to prevent the work, he will not be permitted to interrupt the enjoyment of such easement.[2]

[1] See *ante*, p. 506.

[2] Brooks *v.* Curtis, 4 Lans. 283; Washburn, Easements, 62, 63.

In the case cited, the plaintiff brought an action to compel the defendants to take down and remove a wall which they had erected upon the top of a wall which divided the plaintiff's store from that of the defendants. The wall was a party wall, standing one half upon the land of each of the parties. The defendants had carried it up so as to add two stories to the height of their building; and this was done with the knowledge and consent of the plaintiff. The court held as to this point that the plaintiff was now estopped to object to the erection; but it was also held that the wall could not be so constructed as to become a nuisance to the plaintiff.

The recent case of Abrams *v.* Seale[1] is important in its bearing upon the effect of silence. The plaintiff's intestate, Ward, sued the defendant for damages for the non-delivery of seven bales of cotton, stored at his warehouse in March, 1866. One of the witnesses for the defendant testified that about the middle of February, 1866, the defendant, the intestate, one Green, and himself (the witness), were at the warehouse together, when Ward stated, in the presence and hearing of the rest, that he had sold thirty-three bales of cotton to Green, above named; and thereupon Green, in the presence and hearing of the defendant and Ward, directed the witness (who was the manager of the warehouse) to ship the said lot of thirty-three bales of cotton to Mobile, as delivered. The witness stated, further, that a portion of this cotton was in the warehouse at the time, and the remainder, including the cotton sued for, was brought there afterwards; and that under the direction of Green, above mentioned, he shipped all of the cotton to Mobile, without word or objection from Ward. The defendant himself testified that while the shipment of some of the cotton was being made Ward was present, and saw it and made no objection; and no objection was made until several months after the cotton had been shipped. There was other evidence of a similar character.

The court below charged the jury that if the several matters and things testified to by the witnesses for the defendant occurred after the execution and delivery to Ward of the cotton receipts in March, 1866, the verdict should be for the defendant; but if before, it ought to be for the plaintiffs, and that nothing which occurred before the execution and delivery of the receipts could

[1] 44 Ala. 297 (1870).

bar the plaintiff's right of recovery. On appeal, the charge was held erroneous.

"It matters not," the court observed, "what contract had been made between Ward and Green. If Ward's declaration, under the circumstances of its making, was calculated to mislead the defendant, and did mislead him as to his duty respecting the cotton, whether made before or after the receipts were given, it was his own misfortune, and ought not to be visited on the defendant. This was the inquiry for the jury under proper instructions from the court. The giving of the receipts to Ward was not inconsistent with the sale of the cotton by Ward to Green. Ward needed them to prove his delivery of the cotton, and to settle with Green. If Ward's conversation was addressed to the defendant or his agent, or intended to be heard by them, and he heard Green direct the agent to ship the cotton to Mobile, as it was delivered, without objection either at the time or before the shipment, he has no ground of action. But if it was incidental and not addressed to them particularly, nor calculated to influence them, or did not mislead them, the defendant would be liable."

The decision in this case seems to us open to criticism. In the first place, it may be worthy a *quære* whether giving a receipt *after* the transactions above mentioned would not be pretty strong evidence that the defendant had not been misled by the conduct of Ward, and that the defendant still regarded the plaintiff as owner of the cotton. But waiving this objection, and accepting the answer of the court to it, we think the last sentence quoted overlooks one of the real points in the case. It seems to us that Ward's active conduct might be left entirely out of the case, and that the question of estoppel would still remain and depend upon the answer to the question, Did the *silence* of Ward, and his apparent acquiescence in the shipment of his cotton as the property of Green, accompanied as they were with full knowledge of the fact of ownership and of the acts of Green, mislead the defendant, and cause him to do as he had done? If so, then the defendant would not be liable. True, the active conduct of Ward would, if proved, be conclusive evidence, probably, of his assent to the transactions; but it does not follow that the defendant would be liable if the active conduct should not be proved. The court below should have been directed to submit both questions to the jury.

In Watson *v.* Knight,[1] the plaintiff brought an action of tres-

[1] 44 Ala. 352.

pass against the defendant, a constable, for taking certain property of his under an execution against one Beason. To support the defence, the constable offered to prove that on the day of sale Beason claimed the property as exempt from execution, in the presence of the plaintiff, who said nothing. It had been previously shown that Beason formerly owned the property, and had sold it to Knight about a month before the sale by the constable, and had given him possession before the levy. The plaintiff had given the defendant notice that the property belonged to him. The evidence offered was excluded by the court below, and the judgment was affirmed on appeal.

The court observed that the claim of exemption set up by Beason was as much a defence of his right to sell to the plaintiff as the claim of property in himself, and did not call for contradiction. The defendant had received notice from the plaintiff of his claim, and the declaration of Beason was an additional reason why he should not sell.

The recent case of Guthrie *v.* Quinn[1] involved this subject. This was a bill in chancery by Quinn against Guthrie, Lewis, and others, in which he alleged these facts: That Guthrie had purchased a horse from him for a certain sum, to be paid about two and a half months afterwards; that to secure payment, Guthrie gave him a mortgage on his growing crop; that before the sale was consummated, Quinn had an interview with the defendant, Lewis, in regard to the sale, and informed Lewis of the proposition, to which Lewis replied that "Guthrie would be entitled to half the crop he was making, and it would be all right," but at the same time advising Quinn to retain a lien on the horse, which was done. The bill further stated that the crop above referred to was growing on the land of Lewis, but he did not inform Quinn that he had any claim to or interest in the crop. Guthrie afterwards absconded with the horse, and Lewis now, for the first time, informed Quinn that he had a claim on the crop. The plaintiff now sought to subject this to the payment of his debt by foreclosing the mortgage given by Guthrie; and the court held him entitled to the remedy.

Mr. Justice Peters, speaking for the court, now said: "Quinn applied to him [Lewis] for advice when he was about to sell his horse to Guthrie, and Lewis cautioned him not to sell without etaining a lien on the horse, and informed him that Guthrie

[1] 43 Ala. 561 (1869).

would be entitled to one half the crop he was making on his (Lewis's) land, and that 'it would be all right.' This language could not have been reasonably construed to mean less than that the crop would be liable to aid in paying for the horse. The language was addressed to Quinn. It could not be all right to him, if the cotton and corn that Guthrie was making on Lewis's lands were not liable to the payment of the amount about to be contracted for the horse. Nothing less than this would make it all right with Quinn. If Lewis then had claims against Guthrie for which the crop was liable, it was his duty to have disclosed them. If he failed to do this, he waived his right. This is the doctrine of this court as laid down in Steele *v.* Adams."[1]

In Owen *v.* Slatter,[2] the plaintiff filed a bill to obtain an assignment of dower in certain pieces of land, which had been sold under an order of the Orphans' Court, on the application of the plaintiff as administratrix, to the grantor of the defendants. The defence was that the plaintiff had made no reservation of her claim to dower at the sale, and that the defendants had purchased without notice of her claim. The plaintiff was held entitled to recover.

Chilton, C. J., in delivering the opinion of the court, said: "The widow's right to dower is unaffected by the sale, unless, indeed, she bars her right by some act which in a court of equity would constitute it a fraud in her to insist upon it. The facts of the case before us do not make out such a bar. True, the widow

[1] 21 Ala. 534. So if the maker of a note tells one proposing to take it, and desiring to know if he has any defence to it, that it is "all right," he will be estopped to dispute the truth of this admission when sued on the note by the person to whom it was made. Brooks *v.* Martin, 43 Ala. 360. Peters, J.: "There can scarcely be a reasonable doubt that the words used by Martin, in answer to Brooks's inquiry about the note, were calculated to mislead and deceive, if they turned out to be untrue. It is difficult to conceive what would make a note 'all right' that could not be collected by suit, or that would not be paid at maturity, if the maker was able. This would make it all right, and nothing short of this would have that effect. Had there been a suit pending on the note between Brooks and Martin, and the latter had come into court and pleaded that the note was 'all right,' the court could not have refrained from giving judgment against him. Now, by his words, he puts in this plea before suit is brought, and the law will not permit him to withdraw it, after suit is brought. These words amount to an admission that Martin cannot take back without inflicting an injury upon Brooks, who had acted upon it." See, also, Plant *v.* Voegelin, 30 Ala. 160; McCabe *v.* Raney, 32 Ind. 309; Vanderpool *v.* Brake, 28 Ind. 130. But see Jaqua *v.* Montgomery, 33 Ind. 36. But if a defence should arise subsequently to the representation, the maker may set it up. Cloud *v.* Whiting, 38 Ala. 57; Maury *v.* Coleman, 24 Ala. 381.

[2] 26 Ala. 547.

in this case is administratrix, but the law prescribes her duties, and so long as she acts within the scope of those duties it would be singular indeed that she should forfeit her rights as an individual, merely by reason of her having properly complied with the requirements of the law in her fiduciary character. Such sales, when made by commissioners, are judicial in their character, and, like sales under executions, leave the widow's right to dower unaffected. The purchaser is supposed to examine the record, and to know what he is buying, and to purchase with a knowledge that the dower is yet an encumbrance upon the land. The maxim *caveat emptor* applies; and if the purchaser blindly bids off the land without inquiring whether the widow has relinquished her dower, or consented to a sale of it, electing to take a share of the proceeds in lieu thereof, it is his folly, and he has no one to blame but himself. We are of opinion, therefore, that there was no fraud on the part of Mrs. Owen in failing to announce at the sale that the land was sold subject to her dower."

In Hopper *v.* McWhorter,[1] an action of trover for the conversion of slaves, it was contended that the plaintiff, administrator of one Pratt, was estopped by reason of these facts: After the death of Pratt, the slaves were divided between the donees of the deceased, and the share to which the plaintiff was entitled was delivered to Mrs. Pratt. The plaintiff was present at the division, and made no objection to Mrs. Pratt's receiving the share allotted her; and he, having married one of the donees, received the portion allotted his wife.

The court said: "We can perceive none of the qualities of an estoppel in this. Mrs. Pratt, who received the slaves to which her husband's administrator was entitled, gave nothing for them. The administrator made no representations which it would be inequitable for him to disregard; nor, so far as we can see, did he say or do anything in reference to the division, but simply permitted the share, to which he, as administrator of Pratt, was entitled, to go into the possession of his widow."

In an action of debt on a guardianship bond, against the guardian and surety,[2] it appeared that the guardian had been removed by an order of court, and that he subsequently received money as guardian. The surety (Holcomb) knew at the time that Phelps, the guardian, was about to receive the money under pretence of

[1] 18 Ala. 229.

[2] Merrells *v.* Phelps, 34 Conn. 109.

holding the position, but he did not interfere or give notice of the removal. It was now contended that Holcomb was estopped to deny his liability; but it was held that he was not.

It did not appear, the court observed, that Holcomb did or said anything intended or calculated to deceive or mislead, or to induce any one to change his position; and the displacement of the guardian having been a judicial proceeding, it could not be deemed incumbent upon the surety to seek out the plaintiff and communicate to him a fact of which the record of the court gave notice to the world.

In a recent case[1] the plaintiff sued to recover an assessment of taxes on cattle. It appeared that for six years prior to the year 1862, the plaintiff's cattle had been entered in the assessment lists of North Canaan, and the tax upon them had been regularly paid by the plaintiff, without complaint; and in the year 1861, the son of the plaintiff, acting as his agent, entered the cattle in the lists of the town, with the knowledge and consent of the plaintiff. The court held the plaintiff estopped to deny the legality of the assessments.

He "had every reason to expect," it was said, "that the cattle would continue to be entered in the assessment lists of that town, unless he made known to the assessors his objections to such course. It was reasonably certain that his conduct would produce such result, and induce the belief that he desired such course should be taken. Every person of ordinary understanding would have so reasoned under the circumstances; and the plaintiff must, therefore, be taken to have so considered the subject. His silence shows that he assented to what was done. This is further shown by the fact that, after the assessment was made, the plaintiff offered to pay the tax upon the cattle, without the least objection to the legality of the assessment. At that time he questioned only the right of the town to tax the college lands belonging to him. In the case of Smith *v.* Smith,[2] a minor son made a contract for his services, and in the agreement it was stipulated that his wages should be paid to himself. His father was entitled to the value of his labor, and knew the terms of the contract, and, although he resided in the vicinity, made no objection thereto till after the son had been paid, when he paid the contract price. It

[1] Ives *v.* North Canaan, 33 Conn. 402 (1866).

[2] 30 Conn. 111.

was held that his silence showed that he assented to the contract, and he was held to be estopped from claiming the wages of his son."[1]

But the mere payment of taxes improperly assessed, without objection, will not estop a person to resist further assessments.[2] In Landon *v.* Litchfield, just cited, the plaintiff sought to recover money paid by him under protest as a tax on property which he claimed was exempt. It appeared that he had paid the assessments on the property for twenty years previously, without objection; and it was urged that the plaintiff was now estopped to deny the defendant's claim to the taxes. But the court held that there was no foundation for such an objection.

Upon the same principle, if a person makes a note in the name of himself and another, as partners, the other person being present at the time, and not objecting, the latter will be estopped to allege that he was not a partner at the time the note was executed, whatever the truth may have been.[3]

In Taylor *v.* Ely,[4] the plaintiffs, as assignees of one Withey, sought to foreclose a mechanics' lien in his favor, for building a house for the defendants, the work on which was commenced by Withey and finished by the plaintiffs. The plaintiffs claimed a balance due of $1,500. It appeared that Withey, during the negotiations for the assignment of the contract, stated to the plaintiffs that this amount would be due on the completion of the work. This statement was immediately communicated to one of the defendants, who said that he did not know how the fact might be, that his brother knew more about the matter than he did, and referred the plaintiffs to him for information. One of the defendants remarked that he could not then tell how the account stood, as the books were at the store; and subsequently the defendants refused to give such information on the subject as the plaintiffs desired. The plaintiffs now proceeded to finish the house, at considerable outlay; the defendants being present very frequently while the work was going on, but giving no further information concerning the state of the account with Withey, though it also appeared that the defendants supposed they were somewhat in-

[1] See, also, Goddard *v.* Seymour, 30 Conn. 394.

[2] Landon *v.* Litchfield, 11 Conn. 251; Cruger v. Dougherty, 43 N. Y. 107.

[3] Newell *v.* Nixon, 4 Wall. 572. See Danforth *v.* Adams, 29 Conn. 107.

[4] 25 Conn. 250.

debted to him. It was contended for the plaintiffs that the defendants were now estopped to deny their liability to them; but a contrary decision was rendered.

In delivering the opinion of the court, Hinman, J., remarked: "The plaintiffs' claim is founded upon the idea that the defendants' conduct, in suffering the plaintiffs to go on and expend their money in completing Withey's contract, under the false impression that when completed there would be enough due upon it to reimburse them for such expenditures, and would also be enough to pay them for a portion of Withey's indebtedness to them, in connection with the declarations of the defendants, after they were informed that Withey had said that $1,500 would be due when the house was finished, and their refusal to give information in respect to their accounts with Withey, is tantamount to standing by and suffering an honest purchaser to expend his money in the purchase of property to which the party thus consenting to its sale has a claim of which he gives no notice; and as the defendants not only omitted to give any information on the subject when first applied to for the purpose, but subsequently expressly refused to give any, on the ground that they might be blamed by Withey, it is asked whether the express refusal to give any information is not to have the same effect that the silence of a party will have upon his rights to property, if he is standing by when it is sold to a *bona fide* purchaser; and whether it makes any difference in the case that a reason was given for such refusal. No one doubts that by refusing or neglecting to give notice of his rights to property, where it has the effect to mislead a purchaser, by inducing him to believe that no such rights exist, a party may preclude himself from afterwards asserting them. And the case, as we think, turns upon the application of this and other well-settled principles, rather than upon any difficult or doubtful principle itself. We do not assent, however, to the notion that a refusal to speak, with a reason given for it, is the same thing as silent acquiescence in what another does or says. A party cannot be misled unless something is done or omitted which has the effect to mislead him. . . . . The doctrine in regard to estoppels *in pais* is more liberal and less entirely governed by technical rules than estoppels by deed or record. The object is to prevent fraud, not to produce it by entrapping a party; . . . . and where the representation or concealment is not wilfully fraudulent, or is not attended with such

gross negligence of the rights of others as to be tantamount thereto, the party ought not to be estopped.[1] . . . .

"We know of no principle that requires that the evidence of title should be disclosed; or that an account should be rendered where, as in this case, the interest of another may depend upon the state of the account, so long as nothing is done to mislead. It might be prejudicial to the right claimed, if the party was bound to go into details respecting it. The true question must be, whether anything was intentionally, or at least by gross negligence, concealed, which had the effect to mislead.

"Tested by these principles, we think the facts found by the committee are not sufficient to entitle the plaintiffs to relief. There is no actual fraud found against the defendants; and although certain facts and circumstances are found, which might have more or less weight as links in a chain of evidence going to show fraud, yet they are in themselves of an inconclusive character, and, in connection with other facts in the case, are wholly insufficient to induce us to believe that the defendants intended to mislead the plaintiffs. The circumstance on which the plaintiffs' counsel appear to place the most reliance is the fact that the defendants stood by and saw the plaintiffs expend their money in the completion of the building, without informing them that there would be nothing due on the contract, when the house was finished. If this fact was unexplained, it might perhaps fairly be inferred from it that the defendants intended, by means of the plaintiffs' materials and labor upon the building, to reimburse themselves for their overpayments to Withey; and if such was their object, it would be a fraud which would subject them in this application. But the case finds that Withey informed the defendants that he had secured the plaintiffs for completing his agreement; and if this information was believed, and we cannot say the defendants had any reason to disbelieve it, it entirely changes the character of the defendants' acts, by showing that they, as well as the plaintiffs, were misled, and were acting under a mistaken impression induced by the unreliable statements of Withey. Besides, the defendants were not entirely silent in acquiescing in the plaintiffs' work upon the house; and we think, under the circumstances, that it can hardly be said that the plaintiffs, in performing this work, acted with the prudence and caution which

[1] Parker *v.* Barker, 2 Met. 423; Cady *v.* Dyer, 20 Conn. 563. See *post*, pp. 540 *et seq.*

most men would have exercised. They were probably more easily misled than they otherwise would have been, in the hope of obtaining payment of some portion of Withey's indebtedness to them; and so far as they acted under any such inducement, it is chargeable to their own imprudence, for which, obviously, the defendants are not responsible."

In Weber *v.* Weatherby,[1] a mechanics' lien was acquired by the plaintiffs on the house of the defendant, through the latter's conduct. While the house was building, the defendant agreed to sell it to one Ranstead. The house was to be finished like the one adjoining; and Ranstead deposited $100 as forfeit, in case of his failure to comply with the agreement. After this agreement was made, Ranstead purchased of the plaintiffs the range, furnace, and other articles for which the lien was claimed, and they were delivered upon the premises with the knowledge of the defendant, and the furnace was bricked up in the cellar. This furnace cost upwards of $100 more than the one in the adjoining house. Subsequently Ranstead abandoned the contract, and refused to take the house; and the defendant retained the forfeit, and with it the house and fixtures in question, refusing to pay for the latter.

The court remarked that if a furnace had been put into the house precisely like that in the adjoining one, there could have been no question of the liability of the defendant to pay for it, and that it would fasten a lien on the house. This would be effected by holding Ranstead to be the agent of the defendant in procuring the furnace.

The court were also of opinion that the extra cost of the furnace put up by Ranstead could not change the case. The materials must be considered as furnished with the authority of the defendant, and he was estopped from disputing his liability by his conduct.

At an election to fill a vacancy among the trustees of a school, the place having been occupied by the plaintiff, it appeared that he was present at the election of another to his place, remained silent when the office was being filled, as vacant, made no objection when it was filled, and without objection saw the defendants enter upon the duties and assume responsibilities in the office, he himself neglecting to act. The court held that he was now estopped to say that there was no vacancy, and that he still held the position of trustee.[2]

[1] 34 Md. 656.

[2] Colton *v.* Beardsley, 38 Barb. 29.

The Supreme Court of Indiana say, in a recent case, that a mere failure to give notice of a right, where another, without knowledge of the facts, is investing his money, and where it may be fairly concluded that he would not do so if informed of the facts, will generally preclude a subsequent setting up of the claim thus concealed.[1]

In Rice *v.* Dewey,[2] also a recent case, silence was held not to have worked an estoppel. In this case, it was contended by purchasers from a mortgagor that the defendant, assignee of the mortgage, was estopped to set up his mortgage lien against them, by reason of his failure to assert the lien during the making of certain improvements on the land by the purchasers. But the objection was overruled.

The court observed that the defendant had a right to presume that the plaintiffs had examined the records; and no case could be found holding that a mortgagee, whose mortgage was duly recorded, lost any right by neglecting to give personal notice to a purchaser from the mortgagor. The case was not analogous to the class of cases where one having the title to land himself knows that another, ignorant thereof, but believing himself to be the owner, is proceeding to erect improvements thereon, and the real owner conceals his title from him, or remains silent in relation thereto.

In Hawley *v.* Butler,[3] it appeared that the plaintiff in an action for false imprisonment had requested the defendant to confine him in a jail at hand, until he could hear from a certain quarter concerning his detention, rather than to send him a long distance, to a military post, there to await, perhaps for a still longer time, in confinement. The request was granted, and the plaintiff confined accordingly. It was held that this action of the plaintiff was a legal excuse for the detention, if it did not completely estop him from bringing the action.

An officer is not estopped, when sued for neglect of duty in serving an execution, to show that the process was void, even though he return the execution as partly satisfied.[4] Such a state of facts was presented in the case cited, and the court in substance said: By collecting a portion of the amount, the officer did obligate himself to proceed and collect the remainder. Where an

[1] Fletcher *v.* Holmes, 25 Ind. 458, 470 (1865).

[2] 54 Barb. 455 (1862).

[3] 54 Barb. 490.

[4] Tucker *v.* Malloy, 48 Barb. 85.

officer becomes satisfied that there is a want of jurisdiction, he is not bound to act. He may stop as soon as he becomes convinced of this, and, if sued for a neglect of duty, he may show the fact in defence. In the present case, it may have been that the officer was not advised at first of the defective character of the writ; but even if the fact was otherwise, he was justified in his course. The return did not injure any one, and no action had been taken by the plaintiff in consequence of it. It could not, then, work an estoppel.

Forgetfulness was allowed as a defence in the case of an infant recently in the Court of Appeals of New York.[1] In this case, the parents of the defendant, Henrietta Carr, an infant, conveyed to her the premises in controversy. Ten or eleven years afterwards the parents executed a deed of the same premises to the plaintiff in trust. The plaintiff advanced large sums of money on this security, paying also an outstanding mortgage upon the land. Henrietta, then about sixteen years of age, signed her mother's name to the deed, at her mother's request. She had forgotten, at the time, the conveyance to herself; but after the plaintiff had made all his advances, she recollected the deed. The action was brought to bar Henrietta's claim, or to have the land sold, and the plaintiff's advances repaid; but the defendant prevailed.

The case of Slim *v.* Croucher[2] may be reconciled with this on the ground, which would seem fairly inferable, that in that case the party was guilty of great negligence in forgetting the prior fact.

The circumstances under which waiver works an estoppel are clearly stated by Mr. Justice Mullin in a recent case.[3] "It seems to me," he says, "that a waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. There is not in this case any agreement to waive the condition requiring the suit to be brought within a year; nor is the defendant estopped from insisting on the condition. If my tenant agrees to pay me rent on a day named, or his lease will be forfeited, and if before the day I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by

[1] Spencer *v.* Carr, 45 N. Y. 406 (1871).
[2] 1 DeG. F. & J. 518. *Post*, p. 540.
[3] Ripley *v.* Etna Ins. Co., 30 N. Y. 136, 164 (1864).

reason thereof, omits to pay at the day, I am estopped from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not estopped."[1]

Acquiescence, to work an estoppel, seems to depend upon the same principles. It is held that the payment of taxes for a number of years, under an irregular levy, without objection, will not estop the party paying from afterwards objecting to the validity of another assessment made in the same manner.[2]

But if a person enter his name as a subscriber to a fund, he will not be permitted to escape responsibility by alleging that his liability was only to accrue when the subscription was entirely made up, and that this has not been done, if he has encouraged the other subscribers to go on with the enterprise, and make expenditures, knowing at the time that the subscription had not been completed.[3]

In the recent case of Stagg *v.* Insurance Company,[4] the plaintiff brought an action for a 5 per cent commission on renewal premiums, under the following circumstances: It appeared that he became agent of the company by the acceptance of a circular which stated, in a general way, that the usual compensation of such agents was 10 per cent on the first premiums, and 5 per cent on renewals. Subsequently a more specific circular was sent him, containing the following language: "For your services as above you will be allowed a commission of 10 per cent on the first premiums (cash and note), and 5 per cent on all subsequent renewal premiums, *so long as you continue the agent of the company.*" The plaintiff acted upon this second paper for fifteen years, and was then discharged. He now sought to hold the company liable to pay 5 per cent on renewals of premium received *subsequently* to his discharge on policies previously procured by him; and he based his claim upon a custom to this effect between insurance companies and their agents. But the court held that the action could not be maintained; the circular last referred to representing the agreement between the parties as to compensation, and this agreement excluding any proof of usage. And by

[1] See Booth *v.* Bunce, 31 N. Y. 246; O'Donnell *v.* Kelsey, 10 N. Y. 412; Hutchins *v.* Smith, 46 Barb. 235.

[2] Cruger *v.* Dougherty, 43 N. Y. 107. See *ante*, pp. 518, 519.

[3] Hutchins *v.* Smith, 46 Barb. 235.

[4] 10 Wall. 589.

acting upon the circular, receiving and adjusting his compensation by it, he was estopped to deny that it represented the contract under which he had acted.

It is clear that the ground of the estoppel was, that by acting upon the terms of the circular he had affected the position of the company; had he refused to accept the terms proposed, the company might have declined to contract with him, and secured some one else. Having prevented them from doing so, he could not now repudiate the terms of the circular.

In the case of Frost *v.* Saratoga Mutual Insurance Company,[1] an action on a policy of insurance against fire, the insurers defended on the ground of a false warranty, in that the plaintiff, in his application, which was made part of the policy, had stated that there were no buildings within ten rods of the building insured, except such as were mentioned. This was false; but the plaintiff contended that the defendants were estopped to allege the defence for this reason: The fire occurred in the spring of 1840. In the course of the year the defendants were fully apprised that the application did not truly describe all the buildings within the distance mentioned; yet subsequently, and in three successive years, the defendants made assessments on the premium note of the plaintiff, given when the policy was made, which assessments were paid by the plaintiff. The court held that this fact estopped the defendants to set up the breach of warranty.

Having shown that the note was invalid by reason of the fact that the policy was void, and that both must stand or fall together, Beardsley, C. J., speaking for the court, said that the defendants, with full knowledge of the fact of misrepresentation, had elected to treat the note as a valid and available security in their favor. Several sums had accordingly been assessed by the directors of the company, and payment received. "The defendants," said he, "by affirming the validity of the premium note, necessarily affirmed that the policy was also originally valid. This affirmation was acted upon by the plaintiff, for he advanced money in consequence of its being made, and the defendants shall not now be allowed to set up any fact dehors the policy, in order to impeach the original validity of the contract of insurance.[2] *Qui sentit commodum, sentire debet et onus.* The defendants have de-

[1] 5 Denio, 154.

[2] See Hyatt *v.* Wait, 37 Barb. 29; Elliott *v.* Lycoming Mut. Ins. Co., 66 Penn. St. 22; Miller *v.* Mutual Benefit Life Ins. Co., 31 Iowa, 216.

rived advantage from this contract, and they should now bear its burden.[1]

In a case [2] recently before the Supreme Court of Massachusetts, the plaintiffs declared upon a policy of marine insurance. It appeared that a deviation had occurred on a prior trip covered by the same policy, causing a partial loss which was adjusted and paid by the company with full knowledge of the deviation. A total loss having afterwards occurred, for which the present action was brought, the defendants endeavored to escape their liability by setting up the former deviation; but the court refused to allow them to do so.

Bigelow, J., in delivering judgment, observed that "the defendants thus recognized the validity of the policy as a subsisting contract, with a full knowledge of the alleged deviation, and they allowed the plaintiffs to send the vessel to sea, not only without any suggestion that they had forfeited their right to hold the insurers liable, but in the belief that she was covered by a policy the validity of which was not denied or doubted by the defendants by reason of any pre-existing fact. The plaintiffs, under these circumstances, had a right to regard any objection on the ground of the supposed technical deviation to have been waived. Certainly it cannot be allowed as a defence to this action, without operating as in the nature of a fraud on the plaintiffs, who have acted on the belief that the policy was in force during the prosecution of the residue of the voyage."

A license cannot be revoked after it has been acted upon.[3] In Marble *v.* Whitney, just cited, the plaintiff had consented to the alteration of a road, and its location through his land, but afterwards closed it. The defendant tore down the fence, and the plaintiff sued him in trespass. The court held the plaintiff's consent was not a license which he could revoke after the alteration in the road had been made. Commissioners of highways might

[1] This seems to be a misapplication of the maxim referred to; for the defendants derived advantage also from the contract before the acts were done which were held to raise an estoppel, — in the payment of the premiums. It would be more accurate to say, that the defendants had derived an advantage from the acts done after the fire, and therefore they should be bound. But even in this case the maxim is not strictly applicable; for it is quite immaterial to the estoppel whether the party against whom it is alleged has derived an advantage by his acts or not. So far as this matter is concerned, the estoppel rests rather on the injury to the other party.

[2] Silloway *v.* Neptune Ins. Co., 12 Gray, 73.

[3] People *v.* Goodwin, 5 N. Y. 568; Marble *v.* Whitney, 28 N. Y. 297.

act upon a parol consent of the owner in laying out or altering a highway across his lands; and though such consent might be revoked, it must be revoked before the road should be laid out or the alteration made. If the commissioners immediately act on the faith of the consent, and lay out or alter a highway, the owner will be estopped to deny the validity of the act.

In a recent case,[1] which was application for dower, it appeared that the petitioner had for many years resided with her son on the lands of her husband, without any attempt to have her dower assigned. During this time her son took down the old buildings, and erected others for the accommodation of his family, including his mother; and this was done without objection from her, and with her acquiescence and approbation. She continued to reside with her son until his death, and afterward with his widow. It was contended that she was estopped by this conduct to set up a claim for dower in the new buildings; or if otherwise, that it amounted to a license to the son to build upon her estate, and that the house so built should be regarded as his personal estate.

The reply of the court was that at law the new buildings became annexed to the soil, and a part of the realty. There was no claim that they were not annexed to the soil in the usual mode; the party erecting them was the sole owner of the estate, subject to his mother's dower, and could not be presumed to have erected them with a view to their becoming personal estate.

2. *Of Knowledge of the Facts.*

Numerous cases of boundary involve this second element of estoppel. In the case of Liverpool Wharf *v.* Prescott,[2] the plaintiffs brought a writ of entry to recover a narrow strip of land in Boston. It appeared that a line had been agreed upon between the plaintiffs and the defendants about twenty years before the commencement of the action, and had been mutually adopted as the correct one, and built upon accordingly with the acquiescence of the demandants, until some time in 1858 or 1860, when they claimed that the defendants' building was over their line, and notified them in writing, but made no other interruption of the defendants' possession. In the court below, the defendants asked the court to instruct the jury that if they found that the line of the

[1] Husted's Appeal, 34 Conn. 488 (1868). [2] 7 Allen, 494; S. C. 4 Allen, 22.

building had been adopted as the true line, with knowledge, or with reason to believe, that they were going to erect a building upon it and make expensive outlays, and that the defendants did then, with the knowledge of the demandants, adopt the line thus given, and, relying upon it, proceeded at once to make the erections and outlays contemplated, the demandants seeing and knowing it, and standing by without making any objection or giving notice, the demandants would now be bound by this line, and estopped to deny that it was the true boundary. But the court declined to give this instruction, and told the jury that the facts in the case were not sufficient to estop the demandants; and the judgment was affirmed on appeal.

Mr. Justice Hoar now said: "We are of opinion that it was rightly held at the trial that there is no estoppel under such circumstances. There is nothing in the case to show that there was any 'standing by,' and permitting the expenses to be incurred without notice, which was the case put in Thayer *v.* Bacon.[1] The parties did not even undertake to fix a doubtful line by agreement, but only to point the true boundary as fixed by the deed. The authority of Tolman *v.* Sparhawk[2] is, therefore, direct and decisive. The case relied on by the tenants, Kellogg *v.* Smith,[3] is wholly different. There the line in question had been referred to as a fixed boundary, and adopted as such for more than a hundred years; and the decision did not rest on the point of estoppel."

In Thayer *v.* Bacon,[4] — a writ of entry, — it appeared that the demandant, the tenant, and other adjoining owners, signed an agreement in the following terms: "Boston, November 4, 1853. We, the undersigned, owners of wharves and flats east of Harrison Avenue, are desirous of having our respective lines run so as each of us may know our boundary. We severally agree to employ Mr. Alexander Wadsworth to run said lines, and put up stakes or marks to designate each lot, and we further agree to pay our proportion of the expense of the same." The lines were run in pursuance of this agreement, and in 1855 the tenant began building his wharf in conformity with the lines, and having finished it, a quitclaim deed was written on the back of the surveyor's plan, assenting to and establishing the lines; and this deed was signed by the tenant and by some others of the proprietors, but not by the

[1] 3 Allen, 163.
[2] 5 Met. 469.
[3] 7 Cush. 375.
[4] 3 Allen, 163.

demandant, and the deed was never recorded or acknowledged. Judgment was given in favor of the demandant.

"If the instrument," said Hoar, J., for the court, "upon which the defendant relies is to be construed as an agreement to submit to arbitration the line between him and the plaintiff, the ruling of the court at the trial [in favor of the demandant] was wrong, and a new trial must be granted.[1] But we cannot so construe it. . . . . We seek in vain for the usual apt words to constitute a submission to arbitration. It does not appear that there was any controversy between the owners, anything requiring a notice or hearing or decision of conflicting claims. So far as the paper shows, the service expected of Mr. Wadsworth was simply ministerial. There is no agreement to adopt and abide by whatever lines he may determine. Such an agreement, indeed, would not be necessary, but would be implied by law from an explicit agreement to submit to arbitration; but where no such stipulation is clearly made, it does not seem to us to result from the employment of a surveyor to run lines."

The tenant had asked for the following instruction to the jury: That if the jury should believe that the tenant, relying in good faith upon the agreement to run the lines, built his wharf in accordance with them, and released any right he had to other lines, which he would not have done but for the agreement, then the demandant was estopped to claim any land owned by the lines as ascertained. The court, continuing, said it was very clear that this instruction would not have been warranted by law. An estoppel *in pais* must arise from some act of the party against whom it is claimed. If the demandant, with a knowledge or reason to believe that the tenant supposed the lines run were the true lines, stood by and allowed the tenant, without notice or objection, to make expensive outlays upon the premises, he might be estopped from denying that he had adopted the line which was the basis of the tenant's claim. But the prayers for instructions had omitted the element of knowledge by the demandant of the tenant's expenditures.

In another case[2] it appeared that certain parties, intending to establish the true line between their lands, agreed upon a boundary by parol, which was not in fact the true line. But they held possession in accordance with the conventional line; and one of

[1] Searle *v.* Abbe, 13 Gray, 409. [2] Brewer *v.* Boston & W. R. Co., 5 Met. 478.

the parties being about to sell to the defendants, the other stated to the purchasers that the line agreed upon was correct, and that he did not claim beyond it. After the sale the purchasers made improvements next to the conventional line, with the knowledge of the adjoining owner, who was often present and repeatedly pointed out the line, without giving notice of any claim to the land. Having subsequently discovered the true line, and that it extended beyond the improvements, the court held him entitled to recover it.

"We must," said Wilde, J., in delivering judgment, "consider the declarations and admissions of the demandant as having been made in good faith and by mere mistake. And admissions thus made do not, we think, by law operate by way of an estoppel. . . . . Now it does not expressly appear by the case stated that the declarations of the demandant were made to the tenants' agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. Nor does it appear that the tenants will be injured by the flats; for if they purchased with warranty, they may be indemnified. We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly, under a mistake, and that he has made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenants. And we think it clear that declarations thus made do not operate in the nature of an estoppel. A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective, for he may require a warranty, and it would be most unjust that a party should forfeit his estate by a mere mistake."

The principle upon which these cases proceed, it is clear, is that there must have been, when the incorrect line was acted upon, a *knowledge* of the true boundary, in order to estop the party from asserting it within the period of limitation; and this seems well settled, even though it may have been the intention that the incorrect line should be fixed as the true one, and acted upon accordingly.[1]

[1] Corkhill *v.* Landers, 44 Barb. 218; Laverty *v.* Moore, 32 Barb. 347; S. C. 33 N. Y. 658; Raynor *v.* Timerson, 51 Barb. 517; Smith *v.* McNamara, 4 Lans. 169; Reed *v.* McCourt, 41 N. Y. 435; Reed *v.* Farr, 35 N. Y. 113; Rutherford *v.* Tracy, 48 Mo. 325.

But it is said in Alabama that though a partition fence be entirely on the land of one of the proprietors, still if it has been recognized as a partition fence by both parties, it will confer the same rights as if it were in fact so. The recognition would operate as an estoppel *in pais;* and neither party could complain of any act done by the other which would have been lawful had the fence been located on the true line of boundary.[1]

The case of Lefever *v.* Lefever[2] is important in relation to this element of knowledge. It was an action to recover money paid on a transfer of twenty shares of the Huguenot Bank, by reason of false representations and concealment respecting the condition and value of the stock and assets and protested paper of the bank. The plaintiff was a director of the bank, and had been such from its organization; he was usually present at the proceedings of the board of directors, and had taken part in them when the last dividend was declared. He purchased the shares referred to from the cashier. The referee found, among other things, that the defendant had falsely represented that the bank was sound at the time of the purchase, that the stock was above par, and that it held no bad or protested paper; all of which was false, to the knowledge of the cashier. The plaintiff, in point of fact, was ignorant of the truth or falsity of the statements made by the cashier; but it was contended that as an officer of the bank he was bound to know its condition. The court decided in favor of the plaintiff.

Wright, J., who delivered the opinion, said: "In any matter or controversy connected with the business of the bank, or its management, it is clear that want of notice of its condition would not be available to him. Upon well-settled principles of public policy, he would not be allowed to hold himself out to the world as the director or manager of an institution, and then, when sought to be made liable by the people or creditors of the institution, avail himself of the plea of ignorance to repudiate the acts or omissions of himself or his agents. But this case has no relation to the business of the bank or its management. It was simply a sale of stock by an officer of the bank to another; and although the vendee was a director, having the means of knowledge, he was not in the particular transaction chargeable with notice of the condition of the bank. If he was actually ignorant of its condition, the

[1] Henry *v.* Jones, 28 Ala. 385. [2] 30 N. Y. 27.

fraudulent vendor would be legally responsible to him for the deceit as to any stranger to the institution. It was not a case in which the plaintiff was legally bound to know the truth or falsity of the defendant's affirmations."

In a recent case in Ohio,[1] it appeared that the defendant had given two receipts, by mistake, for the same grain. The second receipt came into the plaintiff's hands *bona fide* and for value, after the grain had been delivered on the first receipt. In an action for the non-delivery of the grain on the second receipt, the court allowed the defendant to show that it had been given by mistake.

The element of knowledge of the object of the inquiries of the person to whom the representation was made, was absent in Pierce *v.* Andrews.[2] This was an action of trespass against a deputy-sheriff for taking the plaintiff's horse. It appeared that one Brooks, having an execution against the plaintiff's father, sent his agent to the plaintiff, in whose possession the horse was, to inquire whose property it was; and the agent, without disclosing his agency, or informing the plaintiff of the object of his inquiry, inquired who was the owner of the horse, to which question the plaintiff replied that the horse was his father's. Brooks now sent the defendant to levy upon the horse in accordance with the execution, when the plaintiff claimed the property, and forbade the sale, but all to no purpose. The court held that the plaintiff was not estopped to maintain the action.

They said that it might have been different had the plaintiff known the agent's object in making the inquiry, and had permitted the sale to take place without objection;[3] but no one could be estopped by a deceptive answer to a question which he may rightly deem impertinent, and propounded by an intruder, especially after giving notice on discovering that his statement had been acted upon.

In a recent case[4] in the Circuit Court of the United States, the plaintiff brought an action upon a policy of fire insurance, to which the defence was that there had been a false statement by the plaintiff respecting the existence of a mortgage upon the premises insured. The defendants claimed that there had been a direct question asked by the agent, before the written application

[1] Second National Bank *v.* Walbridge, 19 Ohio St. 419 (1869).

[2] 6 Cush. 4.

[3] Stephens *v.* Baird, 9 Cowen, 274.

[4] Geib *v.* International Ins. Co., 1 Dill. 443 (1870).

had been made, whether there was any mortgage on the property, and that the plaintiff answered no. The plaintiff denied this statement (which was left to the jury to determine), and contended that the defendants were estopped to set up the defence by reason of the following alleged facts: The agent of the company filled up the application in the absence of the plaintiff, and without his knowledge or authority; the application, together with the policy, was brought to the plaintiff by the agent; the plaintiff was a German, unable to read English print or writing; the application was not read by or to the plaintiff; the agent assured the plaintiff that all was right; the plaintiff relied on this assurance, and signed the paper without knowing or being apprised of its nature or contents, and supposing it was a receipt or paper obligating the plaintiff to pay the premium for which the agent had agreed to give a credit; no inquiries were made of the plaintiff by the agent about encumbrances; and the plaintiff did not purposely conceal or mislead the agent as to the mortgage, but was misled by the agent's acts or statements, so that he did not know what he was signing.

The court charged the jury that, if these facts were proved, the company were affected by the acts and conduct of the agent, and the statements in the application in relation to the mortgage could not be set up by the company to defeat the plaintiff's action. The jury found for the defendants.

In a recent case,[1] the plaintiff brought an action for money paid to the defendant's use, at his request. The plaintiff offered herself as a witness at the trial, in support of her claim; but the defendant objected on the ground that she was his wife, and had been living with him as such, and introduced testimony to prove this. The plaintiff, however, proved that at the time she was married to him she had a husband living, and that the defendant knew of the fact. The defendant contended that since the plaintiff had been living with him during the transactions which were the subject of the suit, and had continued afterwards to cohabit with him, she was estopped to assert that she had a husband living at the time. But the court held that the plaintiff's evidence was proper.

The case had been before the court at a previous term, on which occasion it had been intimated that the defendant might rely on the marriage.[2] But the court now said that if the marriage was

[1] Robbins *v.* Potter, 98 Mass. 532 (1868). [2] 11 Allen, 588.

in fact void, they did not intend to be understood as deciding that the fact that the parties had cohabited as husband and wife would estop the plaintiff from denying the marriage, if its invalidity appeared to be as well known to the defendant as to her. The estoppel would only exist as against a party who had been deceived by the pretence and appearance of marriage.

The subject is illustrated by the case of Rapalee *v.* Stewart.[1] This was a proceeding by a judgment creditor of two of the defendants to set aside an assignment made by the debtors to the other defendants. It appeared that the plaintiff, with knowledge that the assignment was fraudulent, made an agreement with the debtor and the trustees named in the assignment, for the management of the property and its distribution, and that its performance had been entered upon. The court held that the action could not be maintained.

"The statute," said Marvin, J., who delivered the judgment, "declares an assignment, made with intent to hinder, delay, or defraud creditors, void as to the persons so hindered, delayed, or defrauded. Why is such an assignment void? It is because the effect of it is to delay or defeat creditors in the collection of their debts, and when made with such intent it is void. But if the creditors consent to the assignment, how can it be said that they are defrauded? One cannot predicate a fraud of facts having his assent, upon a full knowledge of them. There can be no fraud when all the parties interested are equally informed of all the facts, and mutually assent to them. It is true, in this case, the plaintiff was not consulted at the time the assignment was made, but on being advised of its provisions he acquiesced in them, and entered into an agreement with the other creditors, showing an assent to and ratification of the assignment; by which agreement the parties to it consented and agreed that certain other persons, one of them being the assignor debtor, should be joined with the assignees, and should convert and dispose of the property, and pay the creditors in the order of preference mentioned in the assignment. . . . . It would be a fraud upon all the other creditors to this agreement, if the plaintiff should be permitted to maintain this action, and, by setting aside the assignment, gain a preference above them, and secure the payment of his entire debt. I think that the plaintiff was concluded by his acts in reference to the

[1] 27 N. Y. 310.

assignment from attacking it upon the ground of fraud as to creditors.

In the recent case of the Bank of Hindustan *v.* Alison,[1] the question was whether the defendant had, by his conduct, estopped himself from denying that he was a shareholder in the Bank of Hindustan. It appeared that two banking companies, the Bank of Hindustan and the Imperial Bank of China, agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders having the option to take newly created shares in the Bank of Hindustan. The last-named bank issued circulars informing the shareholders of the other bank of the arrangement, and intimating the option to take new shares in the Bank of Hindustan. The defendant thereupon applied for and obtained an allotment of twenty-five shares, paid a portion of the sum due, and engaged to pay the residue. Several calls were afterwards made, of which the defendant had notice, and he never repudiated his liability until the present action was brought against him for the non-payment of the calls. The amalgamation was declared void by a decree in chancery, in 1868; but the plaintiff bank contended that the defendant was estopped by his conduct to deny that he had become a shareholder of the bank. The court decided in favor of the defendant.

In respect to the authorities cited in support of the estoppel, Bovill, C. J., said: "The strongest for the purpose were the cases of Hull Flax and Cotton Mill Co. *v.* Wellesley,[2] and Sewell's case.[3] In the former the court held that the defendant was estopped from denying that he was a shareholder, first, because he had executed the deed of settlement, which authorized the creation of the shares; and, secondly, because he had for five years constantly received a dividend on the shares which he held. Under these circumstances, having bound himself by his execution of the deed, and having accepted a benefit, it was properly held that he had estopped himself from denying that he was a holder of valid shares. That, therefore, is a very different case from the present. In the case of Re New Zealand Banking Corporation, Sewell's case [*supra*], the directors of a company whose capital was £300,000, divided into 3,000 shares of £100 each, made an unauthorized issue of 1,000 additional shares beyond their capital. They afterwards called

[1] Law R. 6 C. P. 54 (1870).
[2] 6 Hurl. & N. 38.
[3] Law R. 3 Ch. App. 131.

general meetings, at which resolutions were passed to increase the capital to £600,000, to be divided into 60,000 shares of £10 each; and it was held that the issue of the 1,000 shares, although originally *ultra vires*, was confirmed by the resolutions, and that the allotters of those shares were bound by the resolutions, and were rightly placed on the list of contributories in the winding up of the company. The ground upon which the decision proceeded was that Mr. Sewell and the other shareholders were parties to the resolutions ratifying what had been done. I find nothing of the kind in the present case. There was another case referred to at the conclusion of the argument, namely, Re London and Northern Insurance Co., Stace and Worth's case,[1] which strongly confirms this view. It is true the circumstances of the two cases are not precisely similar; for there was no application for shares there, as there was here. Two of the directors under an attempted amalgamation, which turned out not to be valid, had attended meetings and acted as if they were shareholders. The court held that, the amalgamation being void, and there being no separate agreement by the defendants to become shareholders independently of the amalgamation, there was nothing to fix them with liability as shareholders."

The learned chief justice then said that it was clear from the circumstances of the case that what had been done was the result of mistake, and that the plaintiffs had not been misled by the defendant. Mr. Justice Willes forcibly stated these points. "Has the defendant . . . . chosen," said he, "to become a shareholder in the Bank of Hindustan? I may at once dispose of that question by saying that he has not so chosen, because his application for the shares was made not only without a knowledge of the facts, with such an ignorance of the facts on his part as would constitute an entire mistake as to the subject-matter of the contract, but with either a corresponding ignorance on the part of the plaintiffs, or with a knowledge that the circumstances were otherwise than their directors represented in the circular to which I have already drawn attention. I will assume that there was no fraud. The other alternative is that both parties were mistaken as to that about which they were contracting; that the plaintiffs honestly meant to sell shares to which was annexed a certain privilege, to be obtained by means of money advanced by the Imperial

[1] Law R. 4 Ch. App. 682.

Bank of China; and that the defendant was satisfied to take shares with that privilege. It now appears that he cannot have shares with that privilege. He is, therefore, not bound by his contract, and the money advanced by the Imperial Bank of China must be restored to them. Another sort of estoppel is sought to be raised, by reason of the plaintiffs having been induced, by the conduct of the defendant, to alter their position. When challenged to show how the plaintiffs had altered their position in consequence of the defendant's conduct, Mr. Brown said the bank might, upon the faith of the defendant and others having become shareholders, have entered into large engagements which they would not otherwise have entered into. I find nothing in the special case to lead me in point of fact to that conclusion; and if it were so, it would be necessary to show that the plaintiffs had been led to adopt such a course by the conduct of the defendant. I think it might be said more justly that the plaintiffs are the wolf, and the defendant the lamb. It was the plaintiffs who led the defendant into the mistake of supposing that he had valid shares in their bank. It was they who held out to him the inducement to become a shareholder. It was they who muddied the sources of information, by intimating to the defendant that he might get shares on the advantageous terms they represented."

The case was now carried to the Exchequer Chamber, where the judgment of the Common Pleas was affirmed.[1] Kelly, C. B., speaking for the court, now said: "A party is only estopped from showing the truth when he has by some act or declaration acquiesced in an assumed state of things, and by such acquiescence the situation of the other party has been altered to his prejudice. For example, where the directors of a company have been guilty of some irregularity in the issuing of shares, and, with knowledge of the irregularity, a party has agreed to become a shareholder, or, after having been made acquainted with the irregularity, has received dividends or done some other act to express his acquiescence in what has been done, so that the situation of the directors has been altered to their prejudice, they have a right to treat him as a shareholder, and he is estopped from setting up the irregularity by way of defence."

Where a party *sui juris* reaffirms a voidable contract, he will be bound by the reaffirmance and estopped to allege that it is

[1] Law R. 6 C. P. 222 (1871).

voidable, if the other party has acted upon the ratification.[1] In the case cited, the jury had been charged that if they believed that the defendant (who had agreed to deliver to the plaintiffs a large quantity of flour), after receiving information of the arrival of the steamer, and of the rise in the price of flour, had either knowledge or fair notice, or reason to believe that he had been deceived in making the contract, then reaffirmed it, he would be bound; for by such reaffirmance the plaintiffs would be bound to provide funds to pay for the flour on its delivery; whereas, if he had at once disaffirmed the contract, no such necessity would have arisen. And this charge was held correct.

The case of Gimon *v.* Davis[2] presents an important aspect of this case. Williams conveyed the land in controversy, by deed, to Ives, taking a mortgage of the property to secure payment. The mortgage was recorded, but the deed was not; and the deed was destroyed by Ives, or at his instance, after the purchase-money had been paid. Williams now, with the consent of Ives, conveyed the land to Condon, in trust for the wife and children of Ives. After this conveyance to Condon, the land was sold under an execution against Ives, and purchased by the plaintiff. After this, Condon, by virtue of a power in the trust deed above mentioned, conveyed the premises to the defendant, Ives and his wife joining in the deed. The plaintiff now brought an action to recover possession; and the defendant contended that he was estopped by the act of Ives, under whom he claimed, in destroying the deed, and thereby disaffirming his title. The court below so charged, in effect; but the judgment was reversed on appeal.

The destruction of the deed from Williams to Ives, the Supreme Court remarked, did not reinvest Williams with the legal title;[3] and an estoppel resting in parol could have no effect upon the title to land, in a trial at law.[4] The fact was also remarked that the defendant was, in the eye of the law, affected with notice of the conveyance from Williams to Ives, through the recorded mortgage to the former from Ives; for Ives, by uniting with his wife and Condon in the deed to the plaintiff, had become the plaintiff's grantor. And this is another reason why there could be no estoppel; the defendant having knowledge of the facts at the time of his purchase.

[1] Bronson *v.* Wiman, 8 N. Y. 182; S. C. 10 Barb. 406.

[2] 36 Ala. 589.

[3] King *v.* Crocheron, 14 Ala. 822; Mallory *v.* Stodder, 6 Ala. 801.

[4] *Sed qu.* See Brown *v.* Wheeler, 17 Conn. 345; *post*, Chap. XXI.

It is also well established that, in order to the estoppel, there must have been knowledge, actual or constructive, by the party making the representation, that the other party intended at the time to act upon it.[1] In the case cited, the plaintiff, as indorser, sued the maker of a promissory note; to which the defence was that the note was given for intoxicating liquors sold in violation of law. On the trial it appeared that the note was offered for sale to the plaintiff, who, before closing the bargain, showed it to the defendant, and inquired whether it was "all right"; to which the defendant answered, "Yes, it is all right; I shall pay it soon."

The court observed that there was no evidence that the defendant had any knowledge that the plaintiff intended to act upon the statements made by him. There was nothing in the evidence inconsistent with a belief on the part of the defendant, at the time he made the statements, that the plaintiff was then the owner of the note.

It seems to be settled that a party's ignorance of the truth of the representation made will not remove the estoppel, if his ignorance is the result of gross negligence.[2] The case first cited was trover by the trustee in insolvency of an insurance company for certain bonds in the possession of the defendant. It appeared that the defendant, who had been a director and the principal stockholder in the company, signed a certificate to an affidavit of the president of the company, in which certificate it was stated that all the statements made in the affidavit were true so far as the defendant had knowledge. In the affidavit it was declared that the bonds in question were part of the property of the company. It appeared also that the defendant had shortly before signed a receipt which was held by the company, in which he acknowledged that the bonds belonged to the insurance company; and the plaintiff claimed that this receipt had been given to enable the company to make their report to the comptroller of the State. It was also proved that soon after the receipt was given a return was made to the comptroller and published according to law, publication being made in the town in which the defendant resided; and in this return the bonds were also stated to be the property of the company.

[1] Andrews *v.* Lyons, 11 Allen, 349.

[2] Calhoun *v.* Richardson, 30 Conn. 210; Preston *v.* Mann, 25 Conn. 118; Slim *v.* Croucher, 1 DeG. F. & J. 518; Smith *v.* Newton, 38 Ill. 230. See Hoxie *v.* Home Ins. Co., 32 Conn. 21; Beardsley *v.* Foot, 14 Ohio St. 414; Odlin *v.* Gove, 41 N. H. 465.

The court held that evidence was proper to show that the certificate had been given under a misrepresentation of the contents of the affidavit, and with no knowledge that it stated that the bonds belonged to the company; that the defendant might show that, to prevent injury, he had given information as soon as the facts were discovered; that he might show that he was unable to read writing, and that the receipt had been obtained by fraud; and that he might show that he had, in fact, no knowledge of the statement in the return concerning the bonds.

Upon this last point, Mr. Justice Ellsworth, speaking for the court, said: "Now the plaintiff insisted that as the defendant was a director of the company at that time [when the return was made], as well as before and after, and regularly attended the directors' meetings, he must be held to have known the contents of this annual return, and to have assented to it as exhibiting the true situation and condition of the company's assets, and that under all the circumstances of the case the defendant was guilty of fraudulent misconduct or gross negligence in permitting the return, if it was false, to be made and published, and the company to transact business on the credit of it. . . . . This claim, as presenting a principle of law, we think unobjectionable, and so we presume the judge himself considered it; for he proceeded to instruct the jury as to the nature and effect of an estoppel, and correctly enough told them that, to estop the defendant, his action must have been understandingly and intelligently had, and his admissions understandingly and intelligently made, which is well enough as to the point of knowledge; but the judge says nothing about the effect of fraudulent conduct and gross negligence as estopping the defendant, and subjecting him to damages. We think the defendant might have been unacquainted with the contents of the return to the comptroller, and yet possibly be liable on the ground claimed by the plaintiff. The plaintiff insisted that the defendant ought to have informed himself, and not to have given his sanction, either directly or indirectly, to the return, and afterwards set up a claim directly against it. We do not mean to say, as matter of law, that the defendant did sanction the return, or is liable under the circumstances, but it was quite proper that the jury should pass upon the question whether the defendant had been guilty of misconduct or gross negligence, so that he should not be allowed to shield himself upon the plea of ignorance. It is

the summing up in the charge of the court to which we most object, as to the effect of gross negligence when there is not actual knowledge. . . . .

"We forbear to say what degree of neglect and inattention in the directors and officers of incorporated companies, in the duties for which they are appointed and which they are understood to engage to perform to some reasonable extent towards the stockholders and the confiding public, will subject them to damages. This is a delicate point to settle, and not likely to be correctly determined upon the common notions which seem to prevail too generally among certain classes in the community."

In another case[1] before the Supreme Court of Connecticut, Storrs, J., says: "It would seem that where the alleged ignorance involves gross culpability, there should be a limit to the facility with which a party whose words or conduct have misled another to the latter's injury should be permitted to qualify his responsibility by pleading his own fault. For instance, if one who is apparently a party to a bill of exchange, on being inquired of concerning the signature, pronounces it to be genuine, he cannot afterwards set up against a purchaser whom he has misled forgery of his own name, although he may have accredited the bill ignorantly. How far the breach of duty should extend to preclude the party guilty of it from extenuating his false representations by his want of knowledge, it is unnecessary to inquire. Suitably restricted, the principle of which we have given an intimation unquestionably exists, and indeed was hinted at in the opinion of this court in a recent case.[2]

"In one class of transactions, the excuse of ignorance must obviously yield to the operation of the very principle of estoppel *in pais*. We refer to cases among which, on the hypothesis that the jury have found the facts as claimed by the plaintiff, the present may properly be classified; cases where the representations which mislead another are made by a party who is consciously ignorant of the matter to which they relate at the very time that he professes a full knowledge of it. This wilful and wrongful assumption of knowledge is the chief element in the imposition which he practises; and he should not afterwards be suffered to disclaim an acquaintance with facts which he has once unjustly and injuriously professed to know. He has voluntarily induced

[1] Preston *v.* Mann, 25 Conn. 118, 129. [2] Whitaker *v.* Williams, 20 Conn. 98, 104.

another to believe that he was not ignorant of a certain matter; after the other has been betrayed by this false representation, its author should not be permitted to retract it, any more than he should be permitted to deny any other conclusion which he wilfully suffered the other to draw from his words and conduct. He is estopped from pleading a want of knowledge which he has once designedly assumed to possess, and to another's hurt.

"Let us apply this idea to the facts before us. Glazier seeks an interview with Savage on the subject of a note to which Savage is nominally a party, with the view, which he discloses to Savage at the time, of purchasing the obligation. His inquiry does not in general terms relate to negotiable paper, signed in a certain manner, but he states to Savage all the particulars of the note in question, its date, its amount, the time of its maturity, the form of signature, and the names of the payees. To an inquiry thus intelligently put, Savage replies that it is a good note, and will be paid at maturity; an answer from which Glazier might rightfully infer that Savage was acquainted with the particular note spoken of, and the circumstances attending it, and that he knew it to be a valid note which ought to be paid. Savage was bound to know, and did know, that Glazier would understand him as speaking intelligently of a contract with which he was familiar. Shall he now be allowed to say that he knew nothing of the particular note; that he was totally ignorant of its existence, and the circumstances attending it at the time of his interview with Glazier? We cannot recognize such a principle.[1] The representations of Savage, being made relative to a matter affecting his own pecuniary interest, must have carried with them to the mind of the person with whom he was dealing all the sanctions of a new promise. In fact, in cases not distinguishable from the present, courts have sometimes chosen to regard declarations of the kind imputed to the defendant in the light of new and obligatory promises. In a Pennsylvania case,[2] this idea was applied to circumstances very similar to those now under review. A money bond had been given for certain lands under the belief that the title was good to the whole, while in fact it proved defective in respect to a very large proportion of the entire quantity. Before ascertaining this fact, the obligors were called upon by a person who desired to purchase the obligation, and who was informed by them that it was signed by them, and would be paid.

[1] *Ante*, p. 516.

[2] Carnes *v.* Field, 2 Yeates, 541.

The court held in an action brought by the party who had purchased the bond under these circumstances, that he could recover, notwithstanding the want of knowledge of the state of their title on the part of the obligors, on the ground that the representation of the latter was, under the circumstances, to be treated as a new promise. The reason given for the decision may be somewhat questioned, as the independent efficacy of such a promise is evidently not so great as to make it a substantive ground of legal liability, and its effect would seem to be rather that of a representation or ratification, conclusive upon the party who makes it in favor of the party induced by it to change his position."

In a recent case [1] in the English Court of Chancery, it appeared that one Hudson, a builder, having finished several houses at Bromley, applied to the plaintiff's solicitors to know if any client of theirs would lend him money on a mortgage of the houses, informing them that the defendant, Croucher, to whom the land belonged on which the houses had been erected, had agreed to grant him (Hudson) a lease of it for ninety-eight years and a half. The solicitors, having read the agreement for a lease, shown them by Hudson, required an assurance from Croucher that he would grant a lease according to the agreement. Under these circumstances Hudson applied to Croucher, and informed him of the matter, and Croucher thereupon wrote and sent, by Hudson, a letter to the solicitors, in which he said that he was "quite agreeable" to grant the lease. The plaintiff then, by his solicitors, proceeded to prepare the same, and, having done so, notified Croucher and Hudson, and requested them to call and examine it. They did so, and approved of it in writing. The lease was afterwards engrossed, and a counterpart executed, which was handed over to Croucher, the solicitors retaining the lease on behalf of the plaintiff. The plaintiff now loaned Hudson various sums of money on the faith of the security, and Hudson executed an instrument purporting to be a mortgage, by way of underlease of the houses. Hudson subsequently became embarrassed and went abroad; and the plaintiff shortly afterwards discovered that, prior to all these transactions, Croucher had granted a lease to Hudson for ninety-nine years, which had included all the premises comprised in the plaintiff's security, and that this lease had been assigned by Hudson for value to a stranger, and was still subsisting. Croucher thus had

[1] Slim *v.* Croucher, 1 DeG. F. & J. 518 (1860).

no right to grant the second lease, and the mortgage was worthless. The plaintiff now filed a bill against Croucher and Hudson, charging fraud, misrepresentation, and concealment, and praying that Croucher might be ordered to repay to the plaintiff the sums loaned, with interest. Croucher denied the charges of fraud, misrepresentation, and concealment, and stated, in defence to the suit, that, at the time of granting the lease comprised in the plaintiff's security, he had forgotten the grant to Hudson of the prior lease, and had, in consequence, inadvertently granted the second lease. The court held the plaintiff entitled to recover from Croucher, affirming the decree of the vice-chancellor.[1]

The question was somewhat one of jurisdiction, but the matter is so intimately connected with the merits of the case that we cannot entirely omit the consideration of it in the opinions. The lord chancellor said: "There has been a misrepresentation; and if there had been moral fraud in the case, it could hardly have been disputed that a court of equity would have had jurisdiction to inquire into it, and to call upon the defendant to disclose all that he knew, and give relief from the consequences of the fraud. Now although there may not be moral fraud here, yet I think that the party who has been injured has a right to relief. Mr. Lewis, in a very able argument, has cited a number of cases,[2] in which he says that a contrary doctrine has been laid down in this court, but he has not cited one single case similar to this, where it is held that equity will not give relief.

"I think that his authorities may be divided into two classes, — one where there was only a general claim to damages, which a court of equity at that time could not have properly assessed; and the other class where there was a breach of promise, not the misrepresentation of a fact. But here there is the misrepresentation of a fact, and there is no difficulty at all in assessing the amount of the loss, and in doing justice between the parties. I cannot distinguish this case from the case of Burrowes *v.* Lock.[3] There the defendant is called a trustee, because he was a trustee, but the word is used merely to designate the person who took a part in the transaction. There was no fiduciary relation between the plaintiff and the trustee who made the misrepresentation. They were

[1] 2 Giff. 37.

[2] Sainsbury *v.* Jones, 5 Mylne & C. 1; Denton *v.* Stewart, 1 Cox, 258; Greenaway *v.* Adams, 12 Ves. 395; Todd *v.* Gee, 17 Ves. 273; and other cases.

[3] 10 Ves. 470.

strangers to each other just as much as the plaintiff and the defendant are in this case, but the trustee stated, and stated innocently, just as much as the defendant in this case, what was untrue; and it was held that he was liable to make good the loss that had arisen from his misrepresentation. I believe that every word which Sir William Grant uses in that case is applicable to this. 'It is objected,' he says, 'that this is a demand for damages; also, that this was not a wilful misrepresentation. As to the first point, the demand is properly made in equity; and the lord chancellor in Evans *v.* Bicknell [1] declared that the case of Pasley *v.* Freeman,[2] and all others of that class, were more fit for a court of equity than a court of law; but his lordship was clearly of opinion that at least there is a concurrent jurisdiction, and says: It has occurred to me that that case, upon the principles of many decisions in this court, might have been maintained here; for it is a very old head of equity that if a representation is made to another person, going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false.' That is, you may undo the transaction, and you may replace the person to whom the representation is made as far as possible in the same situation in which he was before the representation was made. Lord Eldon certainly does say, 'if he knows it to be false.' But the meaning of that qualification of the proposition is, as I understand the words, if he makes a misrepresentation as to what he ought to have known, and what he did at one time know, although he alleges that at the particular moment that he made the representation he had forgotten it. It so happens that in the case of Burrowes *v.* Lock [*supra*], the person who made the representation set up the same defence as is now done by Mr. Croucher."

The lord chancellor now quotes again the language of Sir William Grant, in the case above cited, which was as follows: "In this case the plaintiff was going to deal with Cartwright, upon a matter of interest, and applied to the person best qualified to give information, the trustee, to know what Cartwright was entitled to; who told the plaintiff expressly that Cartwright was entitled to £ 288, and had an undoubted right to make an assignment to that extent, knowing that he had not a right to make such an assignment, having previously agreed to give another person £ 10

[1] 6 Ves. 174. [2] 3 T. R. 51.

per cent out of the fund. There is, therefore, a concurrence of all the circumstances which the lord chancellor[1] thinks requisite to raise the equity. The excuse alleged by the trustee is, that though he had received information of the facts, he did not at that time recollect it. But what can the plaintiff do, to make out a case of this kind, but show, first, that the fact as represented is false; secondly, that the person making the representation had a knowledge of a fact contrary to it?" The lord chancellor says that he does not find that this case has ever been questioned, and that he regards it as sound.

In a recent case in Ohio,[2] the plaintiffs sought to recover of "Adams & Co." a sum of money placed in their hands for investment, but which they had not invested. The answer was filed, not by Adams & Co., but by another firm, consisting mainly of the same individuals, calling themselves Adams & Co.'s Western Express. It appeared that there were in fact two express companies, composed largely of the same members, having a branch office in the place (Cincinnati), and kept by a common agent. One of these companies was the original firm of Adams & Co., and the other was the one which answered to the suit. The name of the latter company alone was upon the sign over the Cincinnati office; but its business was transacted as well in the name of Adams & Co., and Adams & Co.'s Express, as in its own proper name. The defendants were held liable.

The court said: "Had Miss Pollock [one of the plaintiffs] known the distinctive business and names of these two companies, or had her ignorance been the result of her own fault or folly, or free from fault on the part of defendants, the case would have been different. But such were not the facts. In her eyes both companies were one and the same. To her understanding, the name of one was the name of each, and the business of either was that of both. If this was a misunderstanding, it was a misunderstanding induced by the acts of the defendants, and probably shared in by the public generally. The companies being composed in part of the same individuals, each is presumed to be cognizant of the business and name of the other. If the new company did not intend to deceive and mislead the public, such was at least the effect of their acts. They cannot act in the name of

[1] Lord Eldon in Evans v. Bicknell, 6 Ves. 174.

[2] Adams v. Brown, 16 Ohio St. 75 (1865).

one company, and do the business of that company, and then fall back upon the rights and immunities of the other. They are estopped from so doing. The firm of Adams & Co. seems to have been one of long standing, widely and favorably known to the business community, and for that very reason its name was adopted and used by the other company, as admitted by one of the partners, for the purpose of securing patronage. If they take the benefits of that name, they should also take its burdens."

In a recent case in Maryland,[1] in which the plaintiff sued the defendants on a policy of insurance, it appears that the insured had been discharged under the insolvency laws of the State. This, the court held, would discharge the insurer from liability, by reason of releasing the plaintiff from the payment of his premium notes. But it appeared that the company had received, after the petition for discharge was filed, an instalment of interest due on the premium note, though without actual knowledge of the action of the plaintiff; and it was now contended that this receipt of interest had avoided the effect of the discharge.

"This argument," the court replied, "is based upon the fact that the proceedings in insolvency were had in a court of record, whose proceedings are constructive notice to the whole world, and that, having received the interest on the appellant's note with this constructive notice of his application for the insolvent laws, the appellee cannot now avail itself of said application as a defence to this action. If the proof had shown that the appellee had received the payments of interest with actual knowledge of the appellant's application for the benefit of the insolvent laws, there might have been some reason for the argument that it had thereby waived its right to hold itself absolved from its contract; but upon that question we do not mean to express any opinion. But the proof clearly shows that the proceedings in insolvency were had in a court at some distance from the county in which the office of the appellee was located and its officers resided, and that they had no actual notice of those proceedings, and the discharge of the appellant, until long after the month of August, 1862, when he made his last payment of interest." [2]

[1] Reynolds *v.* Mutual Fire Ins. Co., 34 Md. 280 (1870).

[2] The following cases were cited by the court: Ijams *v.* Hoffman, 1 Md. 437; Gray *v.* Murray, 3 Johns. Ch. 188; Bennett *v.* Colley, 2 Mylne & K. 225; Howard *v.* Carpenter, 11 Md. 279; Flagg *v.* Mann, 2 Sum. 563.

In accordance with the principles in the above cases, directors of corporations, being bound to know the proceedings of the body, cannot escape an estoppel by the allegation of ignorance.[1]

Negligence, however, in order to operate as an estoppel, must be the proximate cause of the loss.[2] The case just cited is an important and interesting one. It was an application for a *mandamus* to compel the defendants to replace the name of the plaintiff on the registry of shareholders of the company, his name having been removed. The facts in brief were these: The plaintiff, the registered owner of 1,000 shares in the company, in which the shares could only be transferred by deed, executed by both transferrer and transferee, employed a broker to sell for him some shares in another company, which were also transferable by deed only. The broker represented it to be necessary for the plaintiff to execute ten blank forms of transfer, which was done, and the blanks delivered to the broker to be filled up for the transfer of the shares in the other company. Only eight of the blanks were thus used by the broker, and having stolen the certificates from a box deposited at a bank for safe custody, he filled up the other two forms as transfers each of 500 of the plaintiff's 1,000 shares in the defendant company, and, having forged the attestations, he delivered the transfers, together with the certificates, to *bona fide* purchasers for value; and when they were presented to the company, they removed the plaintiff's name from the registry, and placed therein the names of the purchasers. Judgment was given for the plaintiff in the Court of Exchequer, and the decision of that court was affirmed by the Exchequer Chamber. There was much diversity, however, in the grounds of decision in the lower court, though it was agreed that, in order to an estoppel against the plaintiff, his negligence towards the broker must have been the proximate cause of the loss; and this they held was not the case here.

Notwithstanding the diversity, we must refer to a portion (undoubtedly sound) of the opinion of Mr. Baron Martin. "One question," he says, "which occurs in the consideration of a contention whether a man has, by his conduct, estopped himself from averring the truth, must be whether his conduct be such as, assuming it to have caused damage to the person alleging the estoppel, would render him liable to an action at the suit of this person. This

[1] Stone *v.* Great Western Oil Co., 41 Ill. 85.

[2] Swan *v.* North British Co., 7 Hurl. & N. 603; S. C. in error, 2 Hurl. & C. 175.

point was referred to by Baron Parke, in delivering the opinion of the judges in the Bank of Ireland *v.* The Trustees of Evans's Charities;[1] and it is an apt and pertinent one. If he would not be liable to an action, it is difficult to see how he can be estopped. In the present case, one of three parties must suffer the loss consequent upon Oliver's fraud. If the plaintiff fails in the present action, he is the person who must bear it. If, on the other hand, he succeeds, the loss must fall either upon the defendants or the transferees; and if it could be made out that the defendants, in the event of the name of the plaintiff being replaced on the register, would be liable to make good to the transferees their loss, and the defendants could maintain an action against the plaintiff for an indemnity, it would go very far to show that the defendants ought now to succeed, as a decision in favor of the plaintiff would only lead to circuity of action, which, as far as possible, ought to be avoided. An action of this kind at the suit of the defendants would be very complicated, but the principle of it may be tested by one at the suit of the transferee. Suppose the case to be that, before the name of the transferee had been entered upon the register, the plaintiff had discovered Oliver's fraud, and given notice to the defendants not to alter the name, and they had acted upon this notice. If the defendants could maintain the action against the plaintiff, the transferee could do so also, for the alleged tortious act of the plaintiff is identical as against both. It seems to me only necessary to state what the averments in the declaration would of necessity be, to show that no such action could be maintained. It would first state that the defendant (in that action) had negligently, and without due care and caution, placed in the hands of Oliver two blank transfers, signed and sealed by him, to enable him to fill them up and transfer to purchasers certain shares in another company; that Oliver had opened a box in which the certificates of the shares in question were deposited, and taken them thereout (this being a felonious act); that having ascertained their numbers, he had inserted them in the blank transfers (this being a second felonious act), and then delivered them to the plaintiff in that action (being a third felonious act), who, believing them to be genuine transfers, paid the purchase-money to Oliver; that the defendant gave notice to the company not to act upon the transfers, and they refused to do so, by reason whereof the plaintiff had lost

[1] 5 H. L. Cas. 389.

his purchase-money, Oliver being insolvent and unable to pay it back. I do not think it would be contended by any one that such a declaration would show a good cause of action. The act of the defendant, however negligent it may be assumed to have been, would be much too remote from the damage to render the defendant liable. . . . . The law prescribes what the conduct of men shall be towards each other; and if the act or negligence of a man afford no right of action to another who has sustained loss in some degree connected with or consequent upon it, how is it possible that the same act or negligence can estop him from averring the truth, which, if he is estopped from doing, the same precise evil consequence will ensue to him as if he had committed an unlawful act?"

In the Court of Errors, Lord Cockburn said: "As regards the alleged estoppel by reason of the plaintiff's negligence, I am of opinion that negligence alone, although it may have afforded an opportunity for the perpetration of a forgery by means of which another party has been damnified, is not of itself a ground of estoppel. The rule relating to negotiable instruments stands on peculiar grounds. The law relating to these instruments is part of the law merchant, which, in order that the negotiability of such instruments — which is of the very essence of their negotiability — shall not be impaired, establishes that if a man once puts his name to such an instrument, he shall be liable to a *bona fide* owner without notice, in respect of what may be added to give effect or negotiability to the instrument, notwithstanding this may be done in the absence of authority, or even for the purposes of fraud. The case of Young *v.* Grote,[1] on which so much reliance has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel in arguing that case, nor the judges in deciding it, refer once to the doctrine of estoppel. The question arose on a disputed item in an account between a banker and his customer, which had been referred to arbitration, and the question raised by the arbitrator was on whom the loss which had arisen from payment of a check, in which, by the carelessness of the customer, an opportunity had been afforded for increasing the amount, should fall. It was held, not that the customer was

[1] 4 Bing. 253.

estopped from denying that the check was a forgery, but that, as the loss which would otherwise fall on the banker, who had paid on a bad check, had been brought about by the negligence of the customer, the latter must sustain the loss. As the question on an account submitted to arbitration, the matter was decided without reference to any technicality; but I am disposed to think that, technically looked at, the matter would stand thus: The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify such a payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action, the right of the banker to immunity in respect of the loss so brought about would afford him a defence in an action by the customer to recover the amount. So, in the present case, if, through the negligence of the plaintiff, the company should sustain a loss with reference to the party who has been substituted for him, the plaintiff might possibly be liable to the company; and if his present demand were simply a money demand, for the value of his shares, it may be that the loss sustained through his negligence might be an answer to the plaintiff's action. But the plaintiff here asks, not for a compensation for money alone, but also for a *mandamus* to restore him to his *status* as a registered shareholder of the company; and it appears to me, therefore, that if the company have any claim on the plaintiff in respect of damage sustained through his negligence, they must be left to their cross-action, or such other remedy as may be available to them." The learned judge thought, however, that even if negligence could form a ground of estoppel in this way, it had not been sufficiently established in the present case; and this view of the case seems to be substantially that above presented in the opinion of Martin, B.

3. *Of the Intention.*

The most important case upon this subject after Pickard *v.* Sears is perhaps Freeman *v.* Cooke,[1] which was decided by the Court of Exchequer, in 1848. It was an action of trover, by the assignees of William Broadbent, against the sheriff of Yorkshire, for goods of the bankrupt. There were pleas of not guilty, not possessed, and leave and license. The conversion alleged was the

[1] 2 Ex. 654.

seizure of the goods by the defendant's officers, under a *fieri facias* against Joseph and Benjamin Broadbent. It appeared that when the officers entered, the bankrupt told them the goods seized were the property of *Benjamin;* he did so, supposing that the officer had no writ against Benjamin. Afterwards he contradicted that statement, and said they were the goods of his brother Joseph. It was contended that this representation bound William, because it induced the officers to seize, and that he could not complain of that act, nor could the assignees who claimed under him. The jury found that the goods were really William's; but they also found "that William represented the goods to the sheriff's officers as the goods of Benjamin *so as* to induce them, by that false representation, to seize them"; and the question was, whether this finding was sufficient to estop the bankrupt, and the plaintiffs as his assignees, from complaining of the seizure of the goods. The question was answered in the negative.

The judgment of the court was delivered by Parke, B., who, referring to the rule in Pickard *v.* Sears, said: "That was founded on previous authorities in the cases Graves *v.* Key[1] and Heane *v.* Rogers,[2] and has been acted upon in some cases since. . . . . Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now the question; but the proposition contained in the rule itself, as above laid down in the case of Pickard *v.* Sears, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that it is acted upon, accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the

[1] 3 Barn. & Ald. 313. [2] 9 Barn. & C. 586.

faith of their being so authorized. But if we apply this rule, either in the terms in which it is enunciated in Pickard *v.* Sears, or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and whatever intention he had on his first statement was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether. In truth, in most cases to which the doctrine in Pickard *v.* Sears is to be applied, the representation is such as to amount to the contract or license of the party making it. Here there is no pretence for saying it amounted to a license, and a contract is out of the question."

One of the most important cases in which the language of Lord Denman in Pickard *v.* Sears is examined and explained is the recent case of Cornish *v.* Abington.[1] This was an action of debt for goods sold and delivered, work done and materials provided, and on accounts stated. It appeared that the plaintiff, a lithographic printer, took into his employment one Gover, to superintend the printing and take orders for printing, at a salary of 35 *s.* a week. The defendant was a publisher. The plaintiff stated that the first order on the defendant's account came from Gover. In September, 1857, the plaintiff made out an account against the defendant, charging him with £108 for printing maps, and gave it to Gover, who handed the account to the defendant, and the defendant paid it. Afterwards, further printing was done by the plaintiff, and paper supplied by him. The plaintiff sent the goods, some of them being accompanied with delivery notes signed by himself, for which receipts were signed by the defendant; while in other instances the delivery notes were from Gover. Gover having left the plaintiff's service in 1858, the plaintiff afterwards called upon the defendant for a settlement of his account. The defendant said he knew nothing about it. The plaintiff asked him if he had not received the account, and the defendant replied that he had had no transactions with the plaintiff, — he owed the money to Gover. He admitted having received the invoice of the paper, and produced it. This invoice charged him as debtor to the plaintiff. The defendant stated that Gover had applied to him

[1] 4 Hurl. & N. 549 (1859).

to publish various works and maps for himself, which the defendant agreed to do, and that he had paid over to Gover the proceeds of the sales, only deducting the commission; and that on receiving the invoice of paper, above referred to, he asked an explanation of it. Gover replied: "That fool Cornish has been making out invoices himself, and has charged you instead of me. I will see him on the subject; he will at once see that it is an error, and you will hear no more about it." The defendant said that he was satisfied with this explanation, and he heard no more about it till the interview with the plaintiff above mentioned. He said that Gover had no authority to pledge his credit with the plaintiff. It was not disputed that as between Gover and the defendant the account was settled. The jury found that the defendant did not authorize Gover to use his name in ordering the work to be done; but they also decided that the manner in which the defendant had signed the receipts was such as to induce the plaintiff to think that he was buying the goods on his own account. Judgment was given for the plaintiff.

"The ground of my opinion," said Pollock, C. B., "is this: The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant, and induced him to furnish goods to the defendant, the defendant must pay him for them. . . . . The sending of the invoice was equivalent to notice that the defendant was not dealing with Gover, but with the plaintiff. If, after that, the defendant chose to accept the explanation of Gover, when he ought not to have been satisfied without communication with the plaintiff, he must take the consequences. Lord Wensleydale,[1] in Freeman *v.* Cooke,[2] commenting on the earlier case of Pickard *v.* Sears, pointed out a limitation of the application of the rule, viz., that 'in most cases to which the doctrine of Pickard *v.* Sears is to be applied, the representation is such as to amount to the contract or license of the party making it.' No doubt, unless the representation amounts to an agreement or license, or is understood by the party to whom it is made as amounting to that, the rule would not apply; but although the case of Freeman *v.* Cooke limited the application of the rule to this extent, the court point out that the word 'wilfully,' in the rule as laid down in Pickard *v.* Sears, means nothing more than 'voluntarily.' Lord Wensleydale, per-

[1] Formerly Baron Parke.

[2] 2 Ex. 654. *Ante*, p. 552.

ceiving that the word 'wilfully' might be read as opposed, not merely to 'involuntarily,' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow."

The learned chief baron then proceeds to declare the true rule upon the subject, which he does in the following language: "If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. In the present case, the plaintiff had given notice that he understood that the defendant was dealing with him. The defendant gave no answer. He ought to have sent back the invoice."

Bramwell, B., put the case upon the same ground. "It is a strong fact that the plaintiff for a long time supposed himself to be dealing with the defendant. When this was brought to the attention of the defendant, he was content to take the word of the servant who was defrauding his master. Taking the finding of the jury that the plaintiff supposed that he was dealing with the defendant, and that the defendant's conduct was such as reasonably to induce that belief, then the rule referred to by the lord chief baron applies. The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

Martin, B., though agreeing in the general conclusion, seems to have hesitated about accepting the doctrine that there could be an estoppel without intention; and the proposition should be received very cautiously, and not adopted as a general rule. In this case it is clear that there had arisen an implied contract through the defendant's negligence. This would seem to be the only case in which the estoppel could arise without an intentional representation.

In a recent case[1] in New York, the court held that it was not necessary to the estoppel that the party against whom it had been alleged should have designed to mislead. In this case an indorser whose Christian name began with M wrote the initial so carelessly that it was read A. C., and notice was given accordingly. The notice, however, finally reached the indorser, after several days, and he was held liable.[2] But this would seem to be referable to the same principle of negligence.

In an English case,[3] a railway company had been deceived into registering shares by transfer to S. and G., and granting them certificates of registration, whereby A., an innocent person, was induced to purchase those shares under the belief that the vendors were registered shareholders. It was afterwards discovered that the transfer to S. and G. was a forgery, and the company were ordered to restore the name of the rightful owner. A. now brought an action against the company to recover the value of the shares at the time the company first refused to recognize him as a shareholder; and it was held that the action was proper.

Lord Cockburn, C. J., said: "If the facts are rightly understood, the case falls within the principle of Pickard *v.* Sears[4] and Freeman *v.* Cooke.[5] The company are bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted *bona fide*, and did all that is required of purchasers

[1] Manufacturers' & T. Bank *v.* Hazard, 30 N. Y. 226.

[2] See Young *v.* Grote, 4 Bing. 253.

[3] *In re* Bahia and San Francisco Ry Co., Law R. 3 Q. B. 584.

[4] 6 Ad. & E. 469.

[5] 2 Ex. 654.

of shares; they paid the value of the shares in money, on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferrers had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. That brings the case within the principle of the decision in Pickard *v.* Sears, as explained in the case of Freeman *v.* Cooke, that if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact."

In another case,[1] in which the plaintiff sought to restrain the defendants from exercising authority over a strip of land as a highway, the defendants rested their claim on the following facts: The heirs of one Gouverneur had several years before opened and fenced a strip of land, communicating with a public road at one end, with the intention of making a dedication of it as a highway. The strip was mapped and designated as a public way, with the consent of the owners, upon a map of the village of Cold Spring. The land so opened and fenced was used by the public from that time, by walking and driving upon it, until the plaintiff closed it. The court held that there had been no dedication.

The law upon the subject was clearly stated by Wright, J., in delivering the opinion of the court. "Undoubtedly the owner of land," said he, "may dedicate or set apart a street or highway through it to the public use, and if the dedication be accepted, it will work an estoppel *in pais*, precluding the owner from asserting any right inconsistent with such use. The dedication and acceptance are to be proved or disproved by the acts of the owner, and the circumstances under which the land has been used. Both are questions of intention. The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication. In the case of a highway, the public must accept the dedication, and, before it is accepted, the owner is not precluded from revoking it. It is not necessary that

[1] Holdane *v.* Cold Spring, 21 N. Y. 474.

there should be any formal act of acceptance by the public authorities, but it may be indicated by common user, under circumstances showing a clear intent to accept and enjoy, as such, the easement proposed to be dedicated. Throwing open land in a village, and fencing it on each side, and causing the way or avenue to be designated as public on a map of the village, are acts tending strongly to show a design presently, or at some future period, to dedicate and devote it to the public use. But these acts are not conclusive to establish a present dedication, binding on the owner of the land. One may fence off a strip of his own land, for the purpose of a passage-way, opening on a public street, or he may lay out a street through it with the view of subdividing his land bounded upon it into village lots, intending upon the sale of such lots to dedicate the street to the use of the public; but in such cases, though the public may have occasionally, or indeed at all times, used the open way in passing to and from the enclosure of an adjoining proprietor, it could scarcely be pretended that the land had thereby become burdened with an irrevocable public servitude."

In a subsequent portion of his opinion, the learned judge shows that the doctrine of estoppel is at the basis of the law concerning dedication. "The referee," he observes, "did not find the fact of dedication; and the facts that are specifically found do not, in my judgment, show that the public acquired a right to the use of the land as a street or highway, by dedication of the former or present owner. Assuming, however, that enough was done by the owners to constitute a present dedication of the land, I think they still had a right to revoke it. The law of dedication is somewhat anomalous; but it may be said to rest, in part at least, upon the doctrine of estoppel *in pais*. Though the owner of land in a city or village may evince, by his acts, an intention to dedicate a street, or square, or other plat of ground, to the public use, no sufficient or valid reason can be assigned against a change of purpose and a subsequent resumption of the possession, unless the public accommodation and private rights are to be materially affected by an interruption of the enjoyment.[1] If, however, private rights have been acquired with reference to such dedication, and such an interest secured, with the assent and concurrence of

[1] Cincinnati *v.* White, 6 Peters, 431; Rutherford *v.* Taylor, 38 Mo. 315; Price Haynes *v.* Thomas, 7 Ind. 38. See also *v.* Thompson, 48 Mo. 361.

the owner, as would render it fraudulent in him to resume his rights, the dedication becomes irrevocable. As in the present case, if the owner of the land had opened the way in question, with the intention to dedicate it to public use as a street, and building-lots had been sold and built upon, bounded on it, with the understanding on the part of the purchasers that the land was permanently devoted to public use, or perhaps if the public accommodation were to be seriously impaired or affected by an interruption of the use or enjoyment of the subject of the dedication, the owner would be precluded from reclaiming his land."

In an action of trespass *quare clausum fregit* for interfering with certain alleys in a cemetery,[1] it appeared that the plaintiff was grantee and the defendant heir of the grantor of a lot adjoining the alleys. There was evidence, upon which the plaintiff attempted to raise an estoppel against the defendant, that the grantor, at the time of the sale of the lot, informed the plaintiff that the alleys were intended for the benefit of the adjoining proprietors, and that if the same party purchased two or more adjoining lots, the alleys separating them could be closed by the purchaser; but it appeared that the grantor did not intend thereby to authorize the closing of the alleys to the detriment of the other owners, or to convey to the purchaser an exclusive right in any alley without extra compensation therefor. It appeared also that the grantee, after the purchase, enriched and kept in order, at his own expense, for nine years, that part of the alleys claimed by him, with the knowledge of the grantor, and without objection from him. The court decided that there was no estoppel upon the defendant.

4. *The Representation must have been acted upon.*

The rule that the representation must have been acted upon in order to the estoppel under consideration is illustrated by Howard *v.* Hudson.[2] This was an action of trespass for false imprisonment. The question of estoppel arose in reference to the warrant. It appeared that the defendant had only a copy of the warrant, but that the plaintiff had been led to believe that he had the

[1] Seymour *v.* Page, 33 Conn. 61.

[2] 2 El. & B. 1.

It is plain there can be no estoppel unless the representation was made at the time or before the change of position, for otherwise it could not have been acted upon. See Garlinghouse *v.* Whitwell, 51 Barb. 208.

original. It was held that the defendant was not estopped to show the fact.

Mr. Justice Erle put the case very clearly and precisely. "Did the defendant," said he, "make a misrepresentation to the plaintiff with intent that the plaintiff should act upon it, and did the plaintiff in consequence so act upon it to his prejudice? The jury have found that the defendant acted as if he had the original, and led the plaintiff to believe he had it; so that there was a representation. But did the plaintiff alter his position for the worse in consequence of that representation? It is clear to my mind that, whether the original warrant, or a copy of it, was annexed to the return, the conduct of the defendant in putting the plaintiff in the remand ward would equally be justified. But the ground mainly relied on seems to be that the plaintiff supposed that the defendant had the original, and therefore lost time and money in applications to a judge and to the Court for the Relief of Insolvent Debtors. But in fact the ground of these applications was, that the warrant was not a sufficient authority for the plaintiff's discharge. That was his contention before the judge and the Court for the Relief of Insolvent Debtors; so that it is clear that he did not make these applications in consequence of believing the representation that the defendant had the warrant, but notwithstanding that he believed that representation."

And the judgment of Crompton, J., is equally pointed. "I think," he observed, "that every case in which we are to act upon it [the doctrine of estoppel] must be brought within the principles so accurately laid down in the elaborate judgment in Freeman *v.* Cooke;[1] and in the present case there is, on the finding of the jury, a want of the two great ingredients; for it is not found that the defendant intended that the plaintiff should act on the faith of the representation, nor that the plaintiff did so act. The word 'wilfully,' which is used in the judgment in Pickard *v.* Sears,[2] has been well commented upon in the judgment in Freeman *v.* Cooke. As the rule is there expressed, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word, not *malo animo*, or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way. That is the true criterion."

[1] 2 Ex. 654. [2] 6 Ad. & E. 469.

There is another late English case on this point, which is instructive.[1] It was an action against a railway company for failing to carry horses safely. It appeared that when the plaintiff delivered the horses to the defendants, he signed a declaration, at their request, that the value of the horses did not exceed £10 each, and that, in consideration of the rate charged, he thereby agreed that the horses were to be carried at his own risk. The horses were injured on the way, by reason of a defect in the conveyance. The defendants paid into court £25, and this would have been sufficient to cover their liability, if the horses had been worth only £10 each, as the plaintiff represented; but in fact they were worth more than this, and at their true value the loss would be £65. This amount the plaintiff claimed in the present action; but the court held him estopped by his representation to the company.

The remarks of Bramwell, B., were forcible. "There is a stipulation," said he, "or statement, whether a representation or contract is immaterial, by which the plaintiff, with a view to induce the defendants to act (and they have acted) upon it, has said that the value of each horse did not exceed £10, and he now professes to say, True it is I did make that statement, in order that the defendants might act upon it; and true it is they have acted upon it; but the statement was untrue, and now I want four times as much as the declared value of one of the horses.[2] This is in effect what he is doing. I think that, according to every principle of law, he cannot be allowed to do so. If there be one principle of law more clear than another, it is this, that when a person has made a deliberate statement, with the view to induce another to act, and he has acted, upon it, the former is not at liberty to deny the truth of the statement so made. I think it would be most mischievous if he could."

In Stimson *v.* Farnham,[3] an action was brought against a sheriff for not levying under a writ of *fieri facias*, and for a false return. The pleas were, not guilty, *nulla bona*, except as to the claim in respect of the return, and that after seizure of the goods by the defendant, the plaintiff ordered him to withdraw from possession; whereupon he did so, and made the return complained of. It

[1] McCance *v.* London and Northwestern Ry. Co., 7 Hurl. & N. 477 (1861).

[2] £40 in addition to the sum paid into court.

[3] Law R. 7 Q. B. 175.

appeared, at the trial, that the plaintiff had obtained judgment against one Fellows, and that the sheriff went upon the premises of the debtor and seized goods there, which were, however, in the possession of a claimant under a bill of sale. The sheriff's officer, at the plaintiff's request, remained upon the premises until dismissed by him. In the mean time the goods were sold under the bill of sale. A return having been called for, the sheriff returned that he had seized *the goods of Fellows*. The retention, and withdrawal from possession under orders from the plaintiff, were also stated in the return. The jury found that the bill of sale was valid; and thereupon a verdict was entered for the defendant. A rule for a new trial was now asked for on the ground that the defendant was concluded by his return. The decision was against the plaintiff.

"An action against a sheriff," said Blackburn, J., "for a false return; will not lie, unless actual damage has been caused to the plaintiffs; and in the present case, on the finding of the jury that the goods seized were not the debtor's goods, there was no damage, and the action will not lie. But, then, was the sheriff estopped by his return? The general rule is, that what a man says is evidence against him, and nothing more. He may show that what he said was a wilful untruth. Nevertheless, there are a good many cases in which a man is not permitted to contradict his assertions, and in which he is precluded, or, in technical language, estopped, from doing so; as in the cases of Pickard *v.* Sears,[1] and Freeman *v.* Cooke.[2] But I do not see anything to bring this return of the sheriff that the goods seized were goods of the debtor — a mere averment preliminary to his answer — within the principle of estoppel, and I do not understand why the fact of his being sheriff should make it operate as an estoppel.

"Where the sheriff has made a return by which he shows a state of things such as that the plaintiff is entitled to receive the money, then the question is quite a different one, for the sheriff says he has money in his hands belonging to the plaintiff. The plaintiff, according to the record as it then stands, is entitled to have the money. Mildway *v.* Smith[3] was not an action for a false return. The sheriff had returned that he did seize the goods of the debtor, and should have levied the debt, but that they were

[1] 6 Ad. & E. 469.
[2] 2 Ex. 654.
[3] 2 Wms. Saund. 343.

rescued out of custody. The plaintiffs brought an action on *scire facias*, and the Court of Common Pleas held that the sheriff was bound by his return, and, consequently, that the plaintiffs were entitled to have execution against him for the value of the goods, as he should have been prepared with sufficient force to resist those people who came to the rescue. Then error was brought, and it could not be denied that the return was bad, but an attempt was made to impugn the judgment of the court below, because credit had been given for the value of the goods, as returned by the sheriff; to which the answer of the Queen's Bench in effect was: He has by his own fault put the plaintiffs to an end of their suit; for they cannot sue a new execution, except only for the surplus of the debt over and above the sum returned, and we cannot order the goods to be sold because they are out of the sheriff's hands. And so, on those proceedings, the sheriff was estopped. That seems reasonable enough. Again, the case of Clerk *v.* Withers [1] related to quite a different matter. Lord Holt there considering the effect of the execution creditor dying after seizure and before sale, points out that the position of the creditor was altered by the goods having been seized, for that he had no further remedy against the judgment debtor, but must proceed against the sheriff, who was bound to sell the goods, and was bound to the value he had stated them to be of in his return, and was not hindered from selling by the death of the execution creditor; and Mildway *v.* Smith was cited. Neither of these case are authorities for saying that the present defendant was estopped by his return. Then in Remmett *v.* Lawrence [2] is a passage which is the only authority supporting the argument of the plaintiff. Lord Campbell, C. J., is reported to have said that if the sheriff had returned that he had got the debtor's goods, he would have been estopped. The observation may possibly have been misunderstood, but more probably the learned judge in forgetfulness used inaccurate language. The *dictum* was cited in the case of Levy *v.* Hale [3] by Williams, J., whose observations merely show that he had not made up his mind that Lord Campbell was not right. But the two cases he cited do not support the *dictum*, nor do I see any principle upon which it could be supported." [4]

[1] 2 Ld. Raym. 1075.
[2] 15 Q. B. 1004.
[3] 29 L. J. C. P. 130.
[4] See to the same effect Barker *v.* Benninger, 14 N. Y. 270; Rivard *v.* Gardner, 39 Ill. 125.

This matter of the necessity of a prejudice to the party raising the estoppel is also illustrated by the case of Schmaltz *v.* Avery.[1] This was an action of *assumpsit* on a charter-party, not under seal, against the defendant for not taking the cargo on board. The charter-party in terms stated that it was made by the plaintiffs as agents for the freighters. It then stated the terms of the contract, and concluded with these words: "This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. [the plaintiff] shall cease as soon as the cargo is shipped." The declaration treated the charter-party as made between the plaintiff and the defendant, without mentioning the character of the plaintiff as agent, and without any reference to the concluding clause; and thereby treating the plaintiff as principal. At the trial it was proved that in point of fact the plaintiff was the real freighter. At the close of the trial it was objected that the plaintiff was concluded by the terms of the charter-party, and fixed with the character of agent, so that he could sue only in that character. The case having gone to the Queen's Bench, the court overruled the objection.

In the course of his remarks, Patteson, J., speaking for the court, said: "In the present case, the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters can be surmised. Any one who could prove himself to have been the real freighter and principal, whether solvent or not, might most unquestionably have sued on this charter-party. The defendant cannot have been in any way prejudiced in respect to any supposed reliance on the solvency of the freighter, since the freighter is admitted to have been unknown to him, and he did not think it necessary to inquire who he was."

The case of Regina *v.* Greene[2] is an interesting and important case upon this point. This was a motion for a *quo warranto* against the defendant for exercising the office of councillor while disqualified by statute. It appeared that the relator, one Brassington, had been well acquainted with the defendant's intention to become a candidate for the office of councillor, and had canvassed for the party opposing him; that he was present when the defendant was elected, and acquiesced in the election; that the election was declared and published; that no notice of the defendant's dis-

[1] 16 Q. B. 655.

[2] 2 Q. B. 460.

qualification, on the grounds now assigned, was given, before or at the time of the election or publication; and that Brassington was chairman of the meeting at which, if at all, the defendant had been appointed to office. And it appeared from the affidavit of Brassington that he had administered to the defendant the declaration required by law. The court held that he could not be heard as relator.

"The principle is," Lord Denman observed, "that he who has concurred in inducing a party to exercise an office cannot be heard in this court on an application to turn him out of the office. If nothing more appeared than the performance of a ministerial function, the case might be otherwise. But it is only when the party elected wishes to act, that he applies to have the declaration administered; and the councillor, by consenting, induces him to think that his qualification is good. It is argued that a penalty would have been incurred by not taking the declaration; but a penalty is likewise imposed by Section 53 for exercising office without being qualified. The principle which precludes a party, having acted as the relator did in this instance, from applying afterward to set the proceeding aside, is the same which prevails in other cases, namely, that a man shall not take his chance of inconsistent advantages. In Rex *v.* Clarke,[1] Lord Kenyon held the relators competent, not merely because the alleged concurrence was after the election, but because the business which they had transacted afterwards was necessary for the corporation, and, as he said, 'There must be magistrates, and the powers of government cannot stand still till the validity of a former disputed election is ascertained.' That reasoning is satisfactory, and distinguishes the case from this. Besides that, the relators in that case, as Lord Kenyon observes, did object at the time of the election. No authority has been mentioned which limits the application of the principle I have adverted to; and this case is clearly within it."[2]

In a late case,[3] certain manufacturers obtained their pay for an engine on a false representation that it had been finished and delivered to a carrier to be delivered to the customer. In point of fact the engine had not been finished at this time, and, indeed, it did not then exist as an engine. The manufacturers, however,

[1] 1 East, 38.

[2] *Post*, Chap. XX.

[3] *Ex parte* Rockford, &c. R. Co. 1 Low. 345 (1869).

were engaged at the time in work upon two engines, either of which would have answered the contract, one of which the manufacturers had expressed an intention of sending to the customer; but this was not done, and the engine was sent to other parties. The engine now in question, and which the customer claimed, was proceeded with and finished, and marked with the name of the petitioning customer. The manufacturers went into bankruptcy, the engine was not shipped, and the petitioner demanded it of the assignees, but did not obtain it. The court now held that the assignees were estopped to say that this was not the engine contracted for with the petitioner.

Mr. Justice Lowell said: "The bankrupts and their assignees cannot deny that there was an engine finished and set apart for these petitioners, and paid for by them early in November. Here is such an engine. If this is not the engine referred to in the correspondence, it is for them to show the other which was. Suppose the bankrupts had never built any other engine like this, would they not be estopped by their acts and correspondence to deny that this chattel was complete on the 4th of November? The fact that there were two chattels precisely alike does not embarrass the case at all. If, when both were in the bankrupts' machine-shop, the petitioners had demanded one in particular, the bankrupts could not have been permitted to say that neither had been appropriated to this contract, because it was on the distinct statement that one had been appropriated, by being pointed out and delivered in some way to the transportation company that they had obtained payment of the price; and so, to defeat an action for the one, they must have been able to show that it was the other that was so appropriated. This they cannot do here, for the contrary is the truth. The argument was that the estoppel could not apply to a chattel not *in esse* when the misrepresentation was made. But the foregoing consideration appears to be a sufficient answer, namely, that the assignees are estopped to say that it was not *in esse*, unless they show some other engine to which the representation applied." [1]

If it be the practice of an insurance company to notify the insured when the premiums are due, but they so act as to induce a belief that the forfeiture clause would not be insisted upon in case of failure to pay at the precise time, declaring that the only risk in not paying is that of death occurring in the interval of non-pay-

[1] See *ante*, p. 363.

ment of overdue premiums, and thus put the insured off his guard, they will not be permitted to take advantage of a forfeiture occurring in this way.[1]

The same doctrine appears in the case of dedication. The law upon this subject is thus stated by the present learned Chief Justice of Michigan:[2] "When a land-owner sets apart portions of his plat for public purposes, it is done with the expectation that the use of such portions for those purposes will be advantageous to the rest of the property, or to the original proprietor. He has a right to expect that within a reasonable time the land will be put in condition to subserve those uses. If given for public buildings, there must be some reasonable assurance that they will be built; and if for ornamental purposes, that it will be made available for those. He cannot be bound to wait and abstain indefinitely from the use of his property upon the chance that some time or other, in the remote future, the public use may be secured. And his efforts to induce such acceptance and use cannot properly be regarded as anything more than repetitions and continuances of his offer, requiring some responsive action. There can be no estoppel in favor of those who are not themselves estopped. And the public can only bind the land-owner by acting upon his dedication before he has an equitable right to withdraw it."[3]

This subject was considered in an important case,[4] in the year 1849, by the Supreme Court of Connecticut. This was a *scire facias* in a process of foreign attachment, demanding the amount of a judgment rendered in the plaintiff's favor against one Clark. The defendant pleaded that he was not the debtor of Clark. It appeared that Clark had made an assignment of his property for the benefit of his creditors, which was defective in a material particular. The assignee, Eaton, by order of court, and with the assent and approbation of Clark, sold the property at public auction to Gavit. The assent of Clark, however, appeared to have been given under a misapprehension of his rights. There were other facts in the case which will presently appear. The plaintiff now attached the property as Clark's, and judgment was given in his favor.

[1] Helme *v.* Philadelphia Life Ins. Co., 61 Penn. St. 107.

[2] Campbell, C. J., in Baker *v.* Johnston, 21 Mich. 319, 345.

[3] See also Lee *v.* Lake, 14 Mich. 12; *ante*, pp. 524, 525, 558, 560.

[4] Whitaker *v.* Williams, 20 Conn. 98.

The defendant had contended, on the argument, that conceding that no title had passed by the sale to Gavit, through the assignment, the assent and approbation of Clark to the sale operated as an estoppel upon him to dispute the validity of the sale or to deny that the trustee had power to transfer the property; and that the plaintiff, not having attached until after the sale, was in no better position than Clark. It was insisted that the case was within the principle on which a sale of property is held valid against the true owner, where he stands by and knowingly suffers a stranger to sell it, in his own name, as his own property.

In answer to this position, the court, by Storrs, J., said: "We have often had occasion to recognize and apply this principle as one of a most just and salutary character.[1] But we think that it is not applicable to the case now before us. The doctrine that one shall not be permitted to retract representations, in which is included conduct, by which he has induced another to adopt a particular course of action, supposes, and is to be understood with, the qualification, which is indeed a part of the principle itself, that the one by whom such representations were made had a knowledge of his rights. In laying down this qualification, we speak of the principle generally, and would not be understood to say that there may not be cases where there is such culpability on the part of the person making such representations, or such particular circumstances or consequences attending them, that he would not be permitted to set up the want of such knowledge. But the present case falls within no such exception. The principle which constitutes such representations an estoppel *in pais* also requires that the action of the other party took place on the strength of them, and was superinduced by them; because otherwise he could not be misled or injured in consequence of them.

"If, in the present case, Clark, being aware that Eaton had acquired no right or title to the claim in question, by the assignment or otherwise, by his declarations, or by his assent to a sale of it to Gavit and Company, induced the latter to believe that the title to the claim was in Eaton, and to purchase it of him under that belief, we should have no doubt that it would not be competent for Clark, or the plaintiff claiming by any subsequent title under him, to deny the validity of such sale; but the evidence

[1] Brown *v.* Wheeler, 17 Conn. 345; Jerome, 18 Conn. 138; Noyes *v.* Ward, Kinney *v.* Farnsworth, Ib. 355; Roe *v.* 19 Conn. 250.

shows no such state of facts. From the bill and decree, which constituted the only evidence on the trial, the allegations of which bill are found true in the decree, it appears that the trustee of Clark claimed no power, authority, or interest in or respecting said claim, excepting such as was vested, or supposed to be vested, in him, by the assignment executed by Clark, and the circumstances attending it, and the orders of the Court of Probate, exercising its jurisdiction over that assignment and the property conveyed by it, under the statute which has been adverted to; that it was by virtue of such authority and interest alone that said trustee intended or professed to sell said claim to Gavit and Company; that the latter, when such sale was made, had knowledge of the provisions of the assignment, and of all the proceedings under it in the Court of Probate, and also knew that the sale was made, and intended to be made, solely by virtue of the authority and interest derived by the trustee from them; that in their purchase they looked to no other source of title; and that, so far from believing that the title to said claim was in Clark, at the time of such sale, they believed that his title to it was divested by the assignment, and vested in the trustee, and that the latter only had authority to dispose of it. The only title of Gavit and Company, alleged in the bill, was one derived, not directly from Clark, but from Eaton, as his trustee under the assignment; and the ground set up in the bill for establishing that title was, that it was the intention to have the claim embraced in the assignment, and its omission by mistake, on which it was claimed that the instrument should be reformed according to such intention. The correction of that mistake would, of course, have been made on the ground that the title in equity was in the trustee, and not in Clark. It did not occur to the counsel for the plaintiffs in that case to set up a title directly from Clark, or that his conduct operated as an estoppel against him or the plaintiff in this case, by which either of them was precluded from asserting that the title to the claim was in Clark, when it was sold by the trustee. Indeed, it is alleged in that bill, after stating the sale by the trustee, ... that the plaintiffs in that case (Gavit and Company) 'thus became the purchasers of said claim, and in equity entitled to have and receive the damages for which said Williams was liable to said Clark' thereon, unless from the manner in which it is also, in connection with that statement, alleged that the sale was with the assent and approbation of

Clark, the construction of the whole averment should be that such assent and approbation constitute in part the title which they claimed. We do not, however, think, from the manner in which the allegation of such assent and approbation was introduced, that it was designed, or should be construed to mean, that the title of those plaintiffs was founded upon it, or strengthened by it." [1]

But the damage may, it would seem, be presumptive, and need not be expressly proved.[2] In the recent important case of Knights *v.* Wiffen, the defendant, Wiffen, was sued for the conversion of sixty quarters of barley. The facts, as stated by Blackburn, J., were, that the defendant had, in his warehouse, a large quantity of barley, and sold to one Maris eighty quarters, which, on the contract between him and Maris, remained in his possession, as unpaid vendor. No particular sacks of the barley were appropriated, as between Maris and Wiffen; but at the time the contract was made, Maris had a right to have eighty quarters out of the barley appropriated to him, and at the same time Wiffen, as the unpaid vendor, had a right to insist on the payment of the price before any part of the grain was given up. Maris afterwards entered into a contract with the plaintiff, Knights, by which he sold him sixty sacks of the barley, and Knights paid him for them. A document was given by Maris to Knights, in the shape of a delivery order, addressed to a station-master of the Great Eastern Railway, instructing him to deliver to Knights's order sixty quarters of barley on his (Maris's) account. Knights forwarded it to the station-master, enclosed in a letter authorizing the station-master to hold it for him. The station-master went to Wiffen and showed him the delivery order and letters, and Wiffen said, "All

[1] The case referred to is reported *sub nom.* Whitaker *v.* Gavit, 18 Conn. 522.

We are inclined to think that the learned judge, whose language we have quoted, placed too much stress on the fact that Clark was ignorant of his rights when he assented to the sale; for this would seem to be an ignorance of law, and that could not have excused him if Gavit had been misled by his conduct. Ellsworth and Waite, JJ., dissented.

[2] Knights *v.* Wiffin, Law R. 5 Q. B. 660; Bassett *v.* Holbrook, 24 Conn. 453. But it has been held that a defendant in trover, who has represented to the plaintiff, when demanding the property, that it was in his possession and control, is not estopped to prove the contrary, though the plaintiff has been induced to sue by reason of the representation. Jackson *v.* Pixley, 9 Cush. 490.

It has also been held that a party will not be estopped by having disclaimed the ownership of property to an administrator, and induced him to proceed to an inventory and appraisal of the property; the administrator having done nothing more than his duty. Turner *v.* Waldo, 40 Vt. 51.

right; when you receive the forwarding note, I will place the barley on the line." Maris became bankrupt, and the defendant, as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master in behalf of the plaintiff. Judgment was given for the plaintiff.

Mr. Justice Blackburn, having recited the facts as above given, down to the reply of Wiffen to the station-master that he would place the barley on the line when the forwarding note arrived, said: "What does that mean? It amounts to this, that Maris having given the order to enable Knights to obtain the barley, Wiffen recognized Knights as the person entitled to the possession of it. Knights had handed the delivery order to the station-master, and Wiffen, when the document was shown to him, said, in effect, It is quite right; I have sixty quarters of barley to Maris's order; I will hold it for you, and when the forwarding note comes, I will put it on the railway for you. Upon that statement Knights rested assured; and Wiffen, by accepting the transfer which had been informally addressed to the station-master, bound himself to Knights. The latter accordingly, when he did not get the goods, brought an action of trover against Wiffen, saying, as it were, You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse, it will be a conversion. And Wiffen now says, It is true, but I *do* refuse to deliver the barley. Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for you. I had no quarters belonging to Maris, for I never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris, until I am paid the full price. No doubt the law is, that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain *in solido*, and no property passes. But can Wiffen here be permitted to say, I never set aside any quarters? As to that, Woodley *v.* Coventry[1] is very much in point; with this difference, that there the plaintiff acted on the statement of the warehouseman, and altered his position by paying the vendee a part of the price, and so the doctrine of estoppel applied; which doctrine is, that when one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then

[1] 2 Hurl. & C. 164.

the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement. Woodley had altered his position by paying part of the price, but Coventry did not know it. In Stonard *v.* Dunkin,[1] it is patent that the defendant knew the money was paid. In Hawes *v.* Watson,[2] it appears that payment had been made, but the defendant did not know of it, although, as a reasonable man, he might have known it was likely. But in neither of those cases did the defendants know that money was *going* to be paid. In the present case, the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that, when he assented to the delivery order, the plaintiff as a reasonable man would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money. Very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once the fact is established that the plaintiff's position is altered by relying on the statement, and taking no steps further, the case becomes identical with Woodley *v.* Coventry and Hawes *v.* Watson. It is to be observed, moreover, that the judgment of the court in Woodley *v.* Coventry did not rest on the fact of the payment of the price. It will be noticed there, that, although the fact did exist of payment of price, Martin, B., seems to found his decision on the *assenting to hold*, and the fact that when that assent was communicated to the plaintiffs they altered their position. In Gillett *v.* Hill[3] there was no payment of the price, and the Court of Exchequer gave judgment against the wharfingers on the ground that they were estopped from denying the facts after the other party had altered his position, relying on their conduct when the delivery order was presented. In the present case, the plaintiff altered his position, relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say, I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true."

[1] 2 Camp. 344. [2] 2 Barn. & C. 540. [3] 2 Cromp. & M. 530.

In the case of Woodley *v.* Coventry,[1] cited by the learned judge, the plaintiffs brought trover for a quantity of flour in the possession of the defendants, one of whom was owner of a grain warehouse. One Clarke, who had purchased, but had not paid for, a quantity of flour of the defendants, applied to the plaintiffs for advances, and delivered to them a delivery order on the defendants for a portion of the flour which he had purchased. The plaintiffs, *before consenting to make any advance on this order*, sent it to the warehouse with the inquiry whether "it was all in order," and received the answer, "Yes." Samples were then taken to the plaintiffs; and they thereupon made an advance of £950 to Clarke. Before the flour had all been delivered, Clarke was declared a bankrupt, and the defendants refused to deliver any more to the plaintiffs; and their defence was, that as the flour purchased by Clarke had never been separated from the bulk, no property had passed. But the court held that they were estopped to set up this defence. The better ground, however, as we conceive it, upon which the case should rest, — that the plaintiffs had been induced to make the advance by the statement of the defendants that the delivery order was all right, — does not appear to have been adverted to.

The case of Stonard *v.* Dunkin,[2] also cited by Blackburn, J., *supra*, was put on the ground of tenancy. In this case, a warehouseman, on receiving an order from a dealer in malt to hold it on account of the plaintiff, gave a written acknowledgment that he so held it. It was contended for the defendants that by the custom of the trade a *remeasuring* of the malt was necessary to a transfer of the property, and that the dealer's bankruptcy intervened before this had been done; and on this ground the assignees claimed the malt.

But Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, The malt is not yours, after acknowledging to hold it on his account. By so doing, they *attorned* to him; and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title."

The case of Hawes *v.* Watson[3] was very similar in facts; and Stonard *v.* Dunkin was cited in favor of the decision. The same

[1] 2 Hurl. & C. 164.
[2] 2 Camp. 344.
[3] 2 Barn. & C 540.

doctrine was again maintained in Gosling *v.* Birnie,[1] and again rested on the ground of attornment. This position, however, seems entirely consistent with the presumption of damage; and damage we understand to be at the bottom of this class of estoppels. To use, substantially, the language of Mr. Justice Blackburn, above given, the plaintiff in all of these cases rests satisfied in the belief, as a reasonable man, that the property has passed to him; and he is prevented by the acknowledgment of the opposite party from taking measures to place himself *in statu quo* with the seller. This would seem, however, to be the utmost limit of the law.

An important question respecting the *quantum* of damages arose in the recent case of Fall River National Bank *v.* Buffinton.[2] In this case, the plaintiffs sued as indorsees of two promissory notes. The defendant's name was on the paper as an indorser; and though this was a forgery, it appeared that they had so represented the signature to be genuine as to estop themselves to deny it. The jury had been instructed that the plaintiffs would be entitled to recover of the defendant the whole amount due on the notes, and that it was immaterial whether the plaintiffs' actual damage or injury in relying upon the representation was more or less. The defendant excepted, but his exceptions were overruled.

Mr. Justice Hoar, in delivering the judgment, said: "Without considering whether the last clause of these instructions was strictly accurate as a statement of the abstract rule of law, we are of opinion that it was correct in its application to the facts of the case on trial, and that the defendant has no just cause of exception to the whole instructions given to the jury. If we take it to be true that a plaintiff is entitled to no more damages than will compensate him for the injury which he has sustained, the plaintiffs here are not seeking to recover damages for the injury occasioned by a false representation. The action is not an action on the case for deceit; it is an action upon promissory notes. The plaintiffs allege that the defendant indorsed the notes in suit; and, instead of proving the facts affirmatively, prove, as by the rules of law they are entitled to do, that the defendant is estopped to deny that the indorsement is obligatory upon him. The whole notes were the property of the bank; the bank had paid full value for them; they were not taken as collateral security for a smaller sum, so that the proceeds, when collected, would be held in part for the

[1] 7 Bing. 339.

[2] 97 Mass. 498 (1867).

benefit of some other person. If the defendant indorsed the notes, he was liable to the plaintiffs for their whole amount; and if, by his conduct, he has precluded himself from denying that he did indorse them, there is no division to be made of his liability as indorser. The injury which permitting him to deny the truth of his representation would occasion to the plaintiffs is the loss of a good and valid indorser upon the notes,[1] which, so far as he is concerned, is the liability for their full amount. If the action were for deceit in making a false representation, the rule of damages would be found by ascertaining, as the defendant asks should be done in this case, in how much worse condition the plaintiffs had been put by reason of the deceit. But the plaintiffs are not in that position. They had some notes of doubtful value. They do not ask to be compensated for having discovered this fact a few weeks later than they might have done if they had not trusted to the defendant's statement, which perhaps occasioned them little injury; but they say, and the finding of the jury entitles them to say, that in consideration of their trusting the defendant's assurances, by his procurement, and thereby exposing themselves to the injury which such delay might occasion, which is a sufficient consideration in law, the defendant made himself liable to them as indorser. . . . .

"The case cited for the defendants, as decided by the New York Court of Appeals in 1853,[2] if in conflict with the cases to which we have referred,[3] does not seem to us based on a correct application of the principle involved. But in the case at bar there were no successive and independent transactions in relation to the notes. Nor can we perceive in what manner it would be consistent with the rule to allow the defendant to show the falsity of his own representations in relation to the question of damages, more than upon any other part of the case. There may be cases where the falsity of a representation in relation to a note, although coming within the rule, would not involve an injury to the whole amount of the note. But here the defendant is responsible for the whole

[1] The plaintiff had refrained from taking steps to collect the notes by reason of the defendant's representation.

[2] Merrill *v.* Tyler, cited in 2 Abb. N. Y. Dig. 588. The case is thus stated by Mr. Abbott: "T.'s name was forged to a note, and M., after he had advanced money on it, inquired of T. concerning it, and T. so spoke as to induce M. to advance more. *Held*, that the forgery was a defence to T. only as to the first advance."

[3] Especially Tobey *v.* Chipman, 13 Allen, 123.

amount due on the notes, unless he is allowed to show that his admission of his responsibility as indorser was untrue; which he has precluded himself from doing."

The case of Tobey *v.* Chipman [1] was referred to by the court as directly in point. The note in this case was for $200, and the action was by an indorsee against the maker. The plaintiff proved that before purchasing the note (which the defendant proved had been made without consideration), the defendant solicited him to buy it, and assured him that it was a good and valid note in every respect, and given for value, and that, relying on this assurance, the plaintiff bought it and paid for it the sum of $100. The defendant now contended that the plaintiff was only entitled to recover this sum with interest; but the court held him entitled to recover the face of the note.

The plaintiff was estopped by his conduct, it was said, to avail himself of the benefit of the statute; and as the entire note belonged to the plaintiff, there was no rule of apportionment by which his recovery could be limited to a part only of its amount.

[1] 13 Allen, 123.

CHAPTER XX.

ELECTION. — INCONSISTENT POSITIONS.

A PARTY cannot occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts.[1] Any decisive act of the party, done with knowledge of his rights and of the fact, determines his election, and works an estoppel.[2] The cases illustrating these rules are very numerous, and we shall present only the more important ones, but enough to fully illustrate their meaning and extent.

It is an old rule of equity that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat, or in any way prevent the full operation of, the will.[3]

[1] Rodermund *v.* Clark, 46 N. Y. 354; Morris *v.* Rexford, 18 N. Y. 552. See Meyer *v.* Clark, 45 N. Y. 286.

[2] Rodermund *v.* Clark, *supra;* Sanger *v.* Wood, 3 Johns. Ch. 416; Littlefield *v.* Brown, 1 Wend. 398; S. C., in error, 11 Wend. 467.

[3] Hyde *v.* Baldwin, 17 Pick. 303; Thellusson *v.* Woodford, 13 Ves. 209; Churchman *v.* Ireland, 1 Russ. & M. 250; Tibbetts *v.* Tibbetts, 19 Ves. 655; Brown *v.* Ricketts, 3 Johns. Ch. 553.

But in a late case in Ohio (Carder *v.* Fayette Co., 16 Ohio St. 353) the Supreme Court say: "We hold that the election of the widow to take under the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claims as heir. She can do all or either of these without having her election set aside. Her right to elect is the creature of statutory law, and we must look to the statutes creating it, alone, for the estoppel it is to work. These statutes make her election to take under the will a bar to dower, and to her distributive part of the personal estate due to her as widow, and to nothing else. A contrary reading of the statutes would, in many instances, result in the greatest injustice to her. She is compelled to make an election, and is only allowed one year for that purpose. The heirs may contest the will, or not, at their discretion, and they are allowed two years in which to commence the contest. The widow must complete her election within one year, and the heir must begin his contest in two years. How can the widow know, at the time of making her election, whether there will be a contest? And if she could know that, must she, at her own peril, predetermine the rights of the parties thereto? There would be no safety to her in such a construction of the law. She might validate the will by an election, and the heirs invalidate it by a contest. It would then

This principle has been extended to cases at law, and is called an estoppel.[1] Smith *v.* Smith was an action for breaking and entering a close. The defendant claimed title under a deed from the father of the parties, who, by his will, had devised the *locus* to the plaintiff, and to the defendant the residue of the land described in the deed, and other lands. The defendant admitted at the trial, that, with a full opportunity to judge, and full knowledge of the nature of the estate given by the will, and of its situation, he had accepted and was determined to hold the estate devised by the will to him; but he intended to hold also under the deed, if the law would allow him to claim under both. It was contended for the defendant, that, having acquired a legal title to the *locus* before the will was made, he could not be divested of it, or estopped to use and enjoy it, by accepting under the will, — at any rate, not at law; but the court decided otherwise, and, referring to the principle of equity above stated, said that it was equally applicable at law.[2]

It becomes a difficult matter, however, in some cases, to determine what constitutes an election. In Fitts *v.* Cook [3] it was held that no election had been made. In this case a testator devised to his son Obed lands of which he was only tenant by the curtesy; and he devised to his wife the use, during life, of a third part of all his real estate, and the right of occupying such part of

seem to be a will as to her, and no will as to them. On the other hand, should she decide that the will was invalid, and would be set aside, and therefore decline to take under it, the will might ultimately be established, and she be made to lose all benefit, however great, of its provisions in her favor. Thus an election, which was intended for the benefit of the widow, would become a means to entrap her, and would render her right uncertain and impracticable. Such is not the law. If there is no valid will, there is no valid election, and of course no estoppel or bar. And it matters not whether the invalidation takes place before or after the election, or at whose instance it takes place. It is only in the event that the document probated becomes or remains established as a valid 'will,' that her election can have any effect whatever; and when such is the case, the effect of the election is confined to her rights as widow, and cannot reach her rights as heir to property not effectually and legally disposed of by the will. The will and its devises and bequests to other persons stand unaffected by her election either to take or to refuse its provisions in her favor. The whole effect, in the one case, is to destroy her rights as widow, and in the other to destroy her rights as devisee or legatee, and in their place to give her the rights of the widow of an intestate."

[1] Smith *v.* Smith, 14 Gray, 532.

[2] But the grantee of land conveyed by an intestate, with intent to defraud his creditors, is not estopped by taking under the deed, and acting upon it, to object, as one of the creditors of the estate, that the deed was fraudulent. Norton *v.* Norton, 5 Cush. 524.

[3] 5 Cush. 596.

his dwelling-house as might best promote her convenience and comfort, and also various articles of personal property. The residue of his property he gave to his children (including Obed), who were also the heirs at law of his wife. The will was proved without objection; and the widow and children continued to live together on the estate without making any division, or setting off dower. The widow having died, the children continued long after upon the premises without change. Her heirs now claimed the land devised to Obed; and he contended that they were estopped to repudiate the will. The court held, however, that no election had been made to take under the will.

Mr. Justice Dewey, in delivering the opinion of the court, said: "It is not inconsistent with Joanna Cook's [the widow's] legal rights, and a present purpose on her part, at a future day, to assert her right to the land of which she was seized in her own right, and independent of her husband. Take the facts as stated. All the other lands were occupied by Obed, as well as those which are the subject of controversy. But the will gave Joanna Cook one third part of the real estate. She did not set off this one third. Things being left in this loose state, and none of the parties exercising rights adversely to each other, it will not do to draw inferences from these acts that shall operate as an estoppel against parties subsequently setting up legal rights to the lands thus occupied. To authorize such an estoppel, the conduct of the party should be manifestly inconsistent with the rights now claimed. Estoppel *in pais* only arises when manifest justice and equity as respects the interest of another require its application. In looking at the provisions of this will, it will be seen that they are so little a departure from what would have been the legal rights of Joanna Cook without the will, that little can be inferred from her subsequent use of the property in the manner set forth in the agreed statement. . . . . The further fact relied upon in the statement, that Obed Cook purchased of Fitts and wife [the plaintiffs], about a year since, their interest in the furniture which was devised by Gad Cook, does not prove any acceptance of the will, or assent to the same. Whether it was the property of Joanna Cook, or property of the estate of Gad Cook, upon the death of Joanna Cook it might naturally be divided among the children who survived her, and be made the subject of a sale of an undivided interest therein. Indeed, the whole circumstances stated as

to the use of the property, after the death of Gad Cook, are consistent with a family arrangement among themselves to live together during the life of Joanna Cook, and all to participate in the property, without any special reference to the will, or to the devise therein of property belonging to Joanna Cook."

It is held in Ohio that where, in case of devise of real estate to a widow for life, with remainder in fee to one of the testator's sons, the widow, without following the form prescribed for making her election to take under the will, set up no claim for dower, but in fact acted under the will, and had the use and occupancy of the premises for a series of years, she was estopped to deny that she had elected to take under the will.[1]

In Dewey *v.* Bell,[2] the plaintiff sued the defendant on a promissory note, the latter being the maker, and the former an indorsee. It appeared that the defendant had executed the note in question for the purpose of renewing a former note, and that his agent carried the note to one Way (who as indorser of the prior note had taken it up), desiring him to take this latter note in exchange and payment for the earlier one. Way said he would take it as collateral to the first note, and the agent assented and left the note with him. Way now indorsed the last note, and procured it to be discounted, and it finally came into the hands of the plaintiff. The court held that when Way procured the note to be discounted, he estopped himself from saying that he had not taken it for the purpose for which it had been made. It operated as a payment of the prior note; and the plaintiff was therefore entitled to recover.

A very similar case was subsequently tried before the same court, and with a like result.[3] "We cannot distinguish this case," said Foster, J., in delivering the judgment, "from Dewey *v.* Bell [*supra*]. The note of November 14 was given for no other purpose than to renew and pay the one of earlier date now in suit. The plaintiff, knowing this fact, had no right, as against this defendant, to take it except in payment. Having elected to take it and enforce it by suit, the law conclusively presumes that he took it for a rightful and not an illegal and fraudulent purpose, and the plaintiff is estopped to allege the contrary. It is plain that both

[1] Thompson *v.* Hoop, 6 Ohio St. 480; overruling Stilley *v.* Folger, 14 Ohio, 610. See Stockton *v.* Wooley, 20 Ohio St. 184, 189.

[2] 5 Allen, 165.

[3] Hooker *v.* Hubbard, 97 Mass. 175.

notes cannot be enforced rightfully against the present defendant. The plaintiff must fail in one of the two pending actions. If the acceptance of the second note be not treated as payment of the first, by a negotiation of the second to a *bona fide* holder for value before maturity, the defendant might have been rendered liable on both. To avoid this unjust result, and prevent the plaintiff from accomplishing a successful fraud to the injury of an innocent person, the just and equitable principle of estoppel is invoked, and the plaintiff is held to be forever bound by that construction of the transaction according to which alone it was rightful. Dewey *v.* Bell is precisely like this case, with this exception; there the negotiation of the note given in payment had actually taken place. The commencement of a suit on the renewal note is an equally decisive act of election to make it the plaintiff's own, and in this case as much as that the plaintiff is estopped to say he did not accept it for the purpose for which it was made."

This doctrine has been held to apply to the case of persons who had procured the passage of an act of the Legislature, under which they had acted and obtained advantage; and the parties were thereafter held estopped to show that the act was unconstitutional,[1] though it had been so pronounced by the courts, as to those who had not participated in its passage.[2] In the case referred to, it appeared that a large portion of the people of Gallatin County, Kentucky, had met in 1864, and resolved to raise $20,000 to be used as a fund to avoid the draft for soldiers. They appointed a committee to obtain an act of the Legislature authorizing the county to issue bonds for the amount mentioned, and to levy a tax to pay the money. The money was borrowed; the volunteers were obtained; an act of the Legislature was procured authorizing the proceedings; the bonds were issued; and the tax was levied. Certain parties who had aided in obtaining the act now prayed an injunction to restrain the collection of the tax; but the prayer was refused.

"Upon what principle of exalted equity," said the court, "shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute as

[1] Ferguson *v.* Landram, 5 Bush, 230. See also Todd *v.* Kerr, 42 Barb. 317; People *v.* Murray, 5 Hill, 468; Van Hook *v.* Whitlock, 26 Wend. 43; Burlington *v.* Gilbert, 31 Iowa, 356.

[2] Ib., 1 Bush, 548.

unconstitutional? Suppose five hundred citizens of Gallatin County had come together, and by written agreement authorized certain gentlemen, as their agents, to borrow $20,000, to be used for raising volunteers to prevent themselves and relatives from being conscripted, is there any doubt that those loaning the money could recover it by personal action from them? . . . . If they could then bind themselves personally and collectively, without a statute, but to render the collection more secure, less uncertain as to the recipients, and more equitable, they should agree, instead of giving their personal obligations, to procure an enactment to compel each one to contribute according to the amount of his property, and constitute the county court their agent to determine this, and have the proper assessment made and collected from each, by what rule of equity or law should they be permitted to withdraw their assent to this assumed liability and agency, though it be evidenced by a statute instead of a mere personal contract? . . . .

"In procuring this money, and obtaining with it volunteer soldiers, these men violated no law of morality or of government. Their contract was not void for want of consideration or for illegality; but it is the *means* by which the sum for its reimbursement is to be raised that they assail. Whilst the borrower and lender of money at usurious rates both violate law, of course there is neither consideration nor estoppel as to the usurious loan; but if the borrower induces a third and innocent party to take the note, he is then estopped, because his conduct becomes fraudulent as to this third party. So a minor who shall contract is not bound, because the other party knows he is doing an illegal act, unless the minor falsely represents that he is of age, and thereby induces another to contract with him under such belief; then because of his fraud the minor is estopped.[1] So may corporations avoid contracts they have no legal power to make until they become fraudulent as to some innocent party, and then they too are estopped, as has been often decided. . . . .

"Suppose the legal voters of a town should petition the Legislature to grant a charter for a manufacturing company, authorize them to organize it by electing officers, and conferring on them the power to borrow a given sum, to be reimbursed by the levy of an annual tax, and that each should have stock according to what he paid of this tax; whilst this statute would be clearly

[1] *Sed qu.* See *ante*, p. 439.

invalid and unenforceable against such as neither petitioned nor voted for the officers, yet as to such as did very different considerations and questions would arise. For, after voluntarily asking the Legislature to provide by law an agent for them, and after appointing that agent, by what rule of law or ethics could they be permitted to repudiate their agent and deny their responsibility to those who may have loaned the money?

"All persons who were themselves liable to draft, or had minor sons or slaves so liable, divided an actual valuable consideration by the avoidance of the draft, and hence are liable. All who participated in the procurement of the law, or afterwards voluntarily ratified it, cannot be heard now to object, especially such as had relatives liable to be conscripted; because, having voluntarily waived this constitutional benefit, they shall not be heard to set it up after the money is procured, the volunteers obtained, and the war ended."

A party by actively affirming a contract or purchase, as by suit or the reception of money upon it, is estopped thereafter to deny its force and effect.[1] In the case of the Water Witch, the consignees of a cargo of freight libelled the ship in which it had been carried for damage to the goods; and the owner of the ship at the same time libelled the cargo for freight and primage. The causes were heard together; and the court held that by receiving the cargo, carrying it to the consignees, and then libelling it, the owner was estopped to deny the ship's liability to deliver the cargo in the same order in which it was received, with the usual exceptions. A decree was therefore given in favor of the consignees for so much as the damage to the cargo exceeded the amount of the freight.

In Breeding *v.* Stamper, above cited, the plaintiff claimed land by virtue of an equitable title. It appeared that the defendant had purchased the land of another, without notice of the plaintiff's claim, that the plaintiff had received part of the purchase-money, and had subsequently contracted to buy a part of the same land from the defendant. The court held him estopped by his conduct to claim the land.

[1] Water Witch, 1 Black, 494; Breeding *v.* Stamper, 18 B. Mon. 175; Flanigan *v.* Turner, 1 Black, 491; Morris *v.* Hall, 41 Ala. 510; Smith *v.* Sheeley, 12 Wall. 358; Phillips *v.* Rogers, 12 Met. 405; Sherman *v.* McKeon, 38 N. Y. 266; Wood *v.* Seely, 32 N. Y. 105; Requa *v.* Holmes, 26 N. Y. 338; Horton *v.* Davis, Ib. 495; Ish *v.* Crane, 8 Ohio St. 520. See also Terrell *v.* Grimmell, 20 Iowa, 393.

So, too, when heirs, after their majority and with full knowledge of the facts, receive and retain the purchase-money of land sold by their guardian, they will be estopped thereafter to object to the sale.[1] And a party is estopped to deny the sufficiency of service by the sheriff, where, with knowledge that it was defective, he receives the proceeds of a sale under it.[2]

The case of Flanigan *v.* Turner[3] was an admiralty suit *in personam* for repairs upon a vessel, against Turner as the owner. The defendant answered that the plaintiffs were joint owners with him, and therefore had no right of action. He also alleged that a bill was pending to dissolve the partnership, sell the vessel, and divide the proceeds among the joint owners. The case was then suspended to await the issue of the *lis pendens*. This latter proceeding went on, the vessel was sold, and Turner claimed the proceeds as sole owner; the other parties consented, and the court so ordered. The court in the suit for repairs now held that Turner was estopped to deny that he was sole owner. This, it is clear, does not rest entirely on the doctrine of *res judicata*, for the same consequence must have followed had Turner himself sold the vessel, and then claimed and received the entire proceeds.

In a case in Alabama,[4] the plaintiff, an administrator, brought an action upon a *quantum meruit* for the hire of slaves. The defence was that the plaintiff, having hired out the slaves to the defendant for a certain time, had taken them away before the time agreed upon had expired. The plaintiff, to avoid this defence, contended that he had no authority to let the slaves as he had done, the effect of which would have been to show that there had been no contract respecting the slaves. But the court held him estopped to deny his authority in the premises.[5]

So, if the owner of a chattel loaned, with full knowledge of a conversion, afterwards transfers to another a note given for the hire, without deduction, and the note is paid by the hirer, the owner is estopped to bring an action for the conversion of the chattel.[6]

If the charter of a bank require the president to reside within

[1] Deford *v.* Mercer, 24 Iowa, 118; Pursley *v.* Hays, 17 Iowa, 310.

[2] Southard *v.* Perry, 21 Iowa, 488.

[3] 1 Black, 491.

[4] Farrow *v.* Bragg, 30 Ala. 261.

[5] See Pistole *v.* Street, 5 Port. (Ala.) 64; Fambro *v.* Gantt, 12 Ala. 298; Swink *v.* Snodgrass, 17 Ala. 653; English *v.* McNair, 34 Ala. 40.

[6] Wilkinson *v.* Moseley, 30 Ala. 562.

the State in which it is located, he cannot, when sued in another State, allege that he is not a resident of the State in which he was required by the charter to reside.[1]

A principal who has accepted a deed made by his agent without authority, will not be permitted to allege the agent's want of authority.[2] And one who has assumed to act as principal in a transaction will not be permitted to allege that he acted only as agent.[3]

So, where two persons, bearing the same name, became entitled to military bounty land, and a patent was issued to each for certain lands differently located, and in the delivery of the patents a mistake occurred, by which the patent of one was delivered to the other, but both acted accordingly, and profited out of the same, without objection, the court held that each of the parties, and all persons claiming under them, were estopped to claim the land of the other.[4]

A party who performs acts required to be done by a written instrument purporting to be signed by him, will be estopped to deny his execution of it.[5]

The acceptance of a mortgage estops the party to deny the mortgagor's title;[6] and one who, having a right to set aside a conveyance as fraudulent, treats it as valid, cannot afterwards allege that it is fraudulent.[7]

A widow, by continuing in possession of her husband's real estate, is estopped as against the heir, to deny his title, for she thus becomes tenant to the heir.[8] And she is also estopped as against the husband's grantee to deny her husband's title.[9]

It is held in California that the State is not estopped to assert title to lands sold under land warrants which had been incorrectly located, by the fact that the purchase-money for the warrants had been paid into the State treasury, which the State had never

[1] Bank of St. Mary's v. St. John, 25 Ala. 566.

[2] Henry County v. Winnebago Drain Co., 52 Ill. 454.

[3] Reigard v. McNeil, 38 Ill. 400.

[4] Gardner v. Ladue, 47 Ill. 211. It does not appear whether the parties became aware of the mistake or not; if they did not, it seems difficult to sustain the decision.

[5] Boggs v. Ocott, 40 Ill. 303.

[6] Conklin v. Smith, 7 Ind. 107; Douglass v. Scott, 5 Ohio, 194; Brown v. Combs, 5 Dutch. 36.

[7] Rennick v. Bank of Chillicothe, 8 Ohio, 529; Fitch v. Baldwin, 17 Johns. 161.

[8] Den d. Bufferlow v. Newsom, 1 Dev. 208; Den d. Williams v. Bennett, 4 Ired. 122; Den d. Grandy v. Bailey, 13 Ired. 221.

[9] Ib.

refunded or offered to refund.[1] The court took the ground that the purchasers were bound to know where to locate the lands, and that the State had never agreed to refund the money in case of an incorrect location.

A municipal corporation is not estopped to claim property belonging to it where it has been improperly sold for taxes as the property of a person who had no title to or possession of it.[2] In the case cited, which was a writ of entry, the city of Boston, the defendant, had become absolute owner of the land in question by virtue of a mortgage (which had been foreclosed), and the expiration of the equity of redemption; and the city had been in possession ever since the foreclosure. Before the equity of redemption had expired, the land had been conveyed to one Pond, and the assessors had taxed it as his, and sold it as his for non-payment of the taxes. The demandant derived title from the purchaser. Judgment was given for the tenants.

The ground taken by the court was, that the assessors and collector were not to be regarded as mere private agents of the city,[3] and their acts in the premises were not, therefore, binding on the city.

In a case recently before the Supreme Court of New York,[4] the defendant had accepted office under a village charter, which contained a reservation by the Legislature of the right to amend. Subsequently this reservation was acted upon and an amendment made; and the defendant still continued to hold the office. The court held that by so doing he had subjected himself to the performance of the duties imposed by the amendment; and a *mandamus* was granted, compelling him to sign certain bonds to which he had refused to give his signature. But a party cannot be estopped from refusing to do an illegal act.[5]

A corporation is not estopped to sue upon the bond of its treasurer, for unfaithfulness and misappropriation of funds, by having accepted the report of an auditing committee which approved his accounts, or by making a report founded thereon to the Legislature.[6] Nor are supervisors estopped by auditing and paying part of a claim

[1] Farish *v.* Coon, 40 Cal. 33.

[2] Rossire *v.* Boston, 4 Allen, 57.

[3] Walcott *v.* Swampscott, 1 Allen, 101; Buttrick *v.* Lowell, Ib. 172; Kimball *v.* Boston, Ib. 417.

[4] People *v.* White, 54 Barb. 622 (1869).

[5] New York and New Haven R. Co. *v.* Schuyler, 38 Barb. 534.

[6] Lexington, &c. R. Co. *v.* Elwell, 8 Allen, 371. See Dunnell Manuf. Co. *v.* Pawtucket, 7 Gray, 277.

to dispute the party's right to the rest, though this involves denying the validity of the payment already made.[1]

Parties who have submitted a dispute to an arbitration *in pais*, and have accepted the award, will not be permitted to open the matter again.[2] So one who accepts the benefit of a judgment will not thereafter be permitted to assign error upon it.[3]

[1] People *v.* New York, 1 Hill, 362.

[2] Males *v.* Lowenstein, 10 Ohio St. 512; Reynolds *v.* Roebuck, 37 Ala. 408.

[3] Ruckman *v.* Alwood, 44 Ill. 183.

CHAPTER XXI.

PLEADING, PRACTICE, AND EVIDENCE, FOR THE THREE DIVISIONS OF ESTOPPEL.

1. *Pleading the Estoppel.*

It has been an unsettled point in the common law whether the estoppel of a record or a deed is available if not pleaded. It had been said in one of the leading cases,[1] that the judgment of a court of competent jurisdiction was as evidence conclusive; while in another leading case[2] the doctrine was maintained that the estoppel of a record was removed by the failure to plead it, and that the jury were in such case at liberty to find according to the truth of the matter. And the same position was taken in an earlier case[3] by Lord Coke, in regard to the estoppel of a deed. In this case — an action on a bond — that great authority said: "The obligee in pleading cannot allege the delivery before the date, ... because he is estopped to take an averment against anything expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped, *because they are sworn to say the truth.*"

The whole doctrine that a record or deed should be pleaded, in order to the estoppel, seems to have been founded on this case; and the tendency of both the English and American courts seemed for a long time to favor this position.[4] Mr. Smith has, however, pointed out the error of the doctrine in his valuable note to the Duchess of Kingston's Case, to which we are so often referring. "It must be observed," he remarks, "that the jurors are *not* sworn to say the truth, but a true verdict to give *according to the evidence.* Now an estoppel precludes the party estopped from offering any evidence to the contrary, and it is difficult to see in what manner the oath of a juror can be opposed to the rule that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it, and that, all the evidence being thus one way, namely, with the record, the jury shall be

[1] Duchess of Kingston's Case, *ante*, p. 37.

[2] Vooght *v.* Winch, 2 Barn. & Ald. 662.

[3] Goddard's Case, 2 Coke, 4.

[4] See notes to Duchess of Kingston's Case, 2 Smith's L. C., Am. ed.

bound to give their verdict for the party with whom all the evidence is, and against the party with whom there is no evidence."

This seems sufficient to overturn the rule in Goddard's Case, and with it the multitude of cases holding the same position on both sides of the Atlantic. The tendency of the decisions has also been strongly the other way since Mr. Smith's work was published, especially in America.[1] We shall not, however, enter into any detailed examination or citation of the cases upon this point; for the question has become of small practical importance in this country, by reason of the somewhat general abrogation of special pleading, and the substitution of code forms.

It was an undisputed rule of the common law that where there was no opportunity to plead the record or deed, it was conclusive in evidence; and where special pleading has been swept away by statute, or rather left optional, it of course cannot be necessary to plead the estoppel in the common-law form. Whether it may be necessary to plead it in any way, or give notice of it, must depend on the terms of the statute.

It has also been well settled at the common law that an estoppel *in pais* need not be pleaded;[2] but this rule has been changed by statute in some of the States.[3] The effect of such a statute, however, is, not to declare that the facts when not pleaded should be

[1] See note of American editors to Duchess of Kingston's Case, 2 Smith's L. C. Mr. Smith himself thinks that the English cases may be reconciled. "It is submitted," he says, in his note to the Duchess of Kingston's Case, "that the cases of Vooght *v.* Winch, and Doe *v.* Huddart [2 Cromp. M. & R. 316], are by no means at variance with the doctrine of De Grey, C. J., viz., that a judgment on the same point, between the same parties, is, in pleading a bar, in evidence conclusive. And it is submitted that the true meaning of this is, that it is conclusive as a plea where there is an *opportunity* of pleading it, but that where there is *no such opportunity*, then it is conclusive as evidence; and that Vooght *v.* Winch, and Doe *v.* Huddart, merely decide that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing so."

But this only shows that the learned writer does not carry out his criticism of Lord Coke to its full extent; and though it may be possible to reconcile the cases upon this distinction, we are not satisfied with the soundness of the rule even with the limitation stated by Mr. Smith. Our objection to it in a word is this: It makes the finding of the facts conclusive in the one case as matter of law, and inconclusive in the other as matter of fact. We cannot understand how the same facts can be conclusive upon the court and not upon the jury. Pleading or omitting to plead cannot affect the *nature* of the facts.

[2] Chitty's Precedents, 407; Sanderson *v.* Collman, 4 Man. & G. 209; Lyon *v.* Reed, 13 Mees. & W. 285.

[3] Wood *v.* Ostram, 29 Ind. 177; Ransom *v.* Stanberry, 22 Iowa, 334.

found according to the truth, but that they are inadmissible in evidence.[1]

The case of Parkes *v.* Smith[2] shows the distinction between a plea in bar and a plea by way of estoppel. This was an action of covenant, alleging an agreement to pay the plaintiff £ 6,800, by instalment, upon a dissolution of partnership between the parties; but five instalments, amounting to £ 4,800, parcel of the £ 6,800, were made subject to a reduction in a certain ratio, if the profits should fall short of a certain amount. The breach was, non-payment of the £ 4,800, and of the other instalments. The plea — which was the important matter in the case — was, as to the £ 4,800, an agreement to arbitrate any differences that might arise respecting the deductions, that difficulties did arise, that they were submitted to arbitration, and that the award was that the whole sum of £ 4,800, the entire amount of the five instalments, should be deducted; that the plaintiff before the action claimed to deduct, and did deduct, this sum, whereby the whole amount was reduced to £ 2,000. This plea was demurred to, on the ground that the matter set up was, in effect, an estoppel, and should have been pleaded as such, instead of in bar. But the court ruled otherwise.

Lord Campbell, C. J.: "I think that the kind of admission which has been relied upon here is to be taken advantage of, not as an estoppel, but as showing that there was no cause of action."

Coleridge, J.: "The argument used here as to estoppel would apply to every case of arbitration; for it might always be said that the finding of a fact against any party by an arbitrator was an admission by that party. The principle of estoppel is, that whether there be a cause of action or not, the party cannot allege it. Here the defence is, that no cause of action existed."

From this summary of the law concerning the pleading of estoppels, we proceed to the more important subject of estoppels which arise by or by reason of the pleadings themselves; in which connection matters of evidence and practice will be constantly involved.

We shall consider the subject in the order of the three divisions of estoppel, as already presented. And first, of questions of pleading and evidence in estoppels by record.

[1] Wood *v.* Ostram, 29 Ind. 177; Ransom *v.* Stanberry, 22 Iowa, 334.

[2] 15 Q. B. 297.

2. *Estoppels by Record.*

The proper plea of the general issue to an action upon a judgment of a court of record is *nul tiel record*. The plea of *nil debet* would admit the existence of the record, and at the same time deny the correctness of the judgment. The same is true in respect of judgments of the sister States.[1] But in the case of judgments of foreign countries, as these are not technically records, the proper way would seem to be to plead *nil debet*, or the special matter which shows that the judgment is void.

The burden of proof rests, as a matter of course, upon the party who sets up the judgment; but it has become the settled practice, in declaring upon a judgment, to allege generally that the plaintiff, by the consideration and judgment of the court, recovered the sum mentioned therein, and not, as formerly, to set out the whole of the proceedings.[2]

But in pleading or replying a judgment, as an estoppel to an action or allegation, more minuteness must be observed. It must now be made to appear that precisely the same point was in issue at the former trial as that now in question, or there can be no estoppel. We refer to several cases upon this point.

The case of Phillips *v.* Berick[3] illustrates an important phase of this subject. The plaintiff sued for work and labor done, and, after a plea of *non assumpsit*, offered to prove that the defendant was indebted to him for services rendered prior to March 8, 1817. But the defendant objected, and produced the record of a judgment rendered at the September term, 1817, upon a debt to the same plaintiff, alleged to have arisen on the 8th of March, 1817. It was contended that this record was conclusive to preclude the plaintiff from giving evidence of any demand for service arising before that time. But the court ruled otherwise.

Spencer, J., said that the question was whether a recovery by the plaintiff for services rendered prior to March 8, 1817, was a bar to any other claim for services performed before that time, though it should appear not only that it was not the same work for which a recovery had already been had, but that it was an entirely different piece of service. He said that it had been decided that a recovery in a former action, apparently for the same

[1] *Ante*, p. 197.

[2] Biddle *v.* Wilkins, 1 Peters, 686.

[3] 16 Johns. 136.

cause, was only *prima facie* evidence that the matter of the subsequent demand had been tried; it was not conclusive.[1] The plaintiff would be required, however, to show clearly and satisfactorily that the services for which he sought to recover were not the same as those embraced in the former suit, and that they grew out of a distinct contract; for if a man labored for another a year, under the same contract, he could not split up the demand, and sue for each day's work.

"If we test the rule we have laid down," he proceeded to say, "by the rules of pleading, the same result will be found. The defendant, had he pleaded specially, must have stated a former recovery. . . . . The replication would be that the promises in this action were not the same identical promises for the non-performance whereof the plaintiff had not recovered by the said judgment. This would have formed an issue to the country; and the inquiry *in pais* would be, whether the former recovery included the demand now in contest; and the burden of proof would be thrown on the plaintiff. The record would be *prima facie* evidence for the defendant; and this the plaintiff would have to meet and overthrow, by showing for what the former recovery was, and that the claim set up anew had not been submitted to the jury, and was a distinct transaction, not so identified with the former suit as to render it an entire contract, incapable of subdivision."

This doctrine that parol evidence is admissible to show or to prove or disprove the identity of the matter in litigation with that of the former adjudication is well settled.[2]

Upon the subject of a second suit for a continuing nuisance, Mr. Justice Rogers[3] says that the plaintiff should file his declaration for the *continuance*, and not for the same cause of action involved in the first suit; and then the verdict and judgment in the former action, given in evidence (the subject of the nuisance and the parties being the same), are conclusive of the damages to the commencement of the writ, and of the right. All that is then required of the plaintiffs is to prove that the nuisance remains in the same, or in a more or less damaging, condition than before.

[1] Snider *v.* Croy, 2 Johns. 227; Seddon *v.* Tutop, 6 Term, 607.

[2] Perkins *v.* Walker, 19 Vt. 144; Gardner *v.* Buckbee, 3 Cowen, 121; Burt *v.* Sternburgh, 4 Cowen, 559. See United States *v.* Lane, 8 Wall. 185.

[3] In Smith *v.* Elliott, 9 Barr, 345.

In Quigley *v.* Campbell,[1] a judgment against an administratrix rendered on a set-off in a suit by her as administratrix for a specific sum, without directing the recovery to be had *de bonis testatoris*, was not allowed to be introduced in evidence under a declaration describing the recovery as *de bonis testatoris*. The court held that in legal effect the former judgment was *de bonis propriis*. That this was the fact, the court said was abundantly shown by the cases in which similar judgments against administrators, in their representative capacity, had been held either ground for reversal or for amendment.[2]

The case of Munson *v.* Munson[3] is an interesting one relating to the effect of the dismissal of a bill in chancery. The trial was an ejectment, and the defendants offered evidence to destroy the effect of a deed under which the plaintiff claimed. The plaintiff, for the purpose of precluding the defendants from introducing the evidence, produced the record of a suit in chancery between the same parties, in which the very matter alleged by the defendants had been tried and found against them. But it appeared also that the case had been reserved for the advice of the Supreme Court, and that the Supreme Court advised that the bill should be dismissed on the ground that the petitioner had an adequate remedy at law; and that the bill was accordingly dismissed.[4] The defendants now claimed that by reason of the dismissal, and of the fact that no decree had been rendered for the petitioner on the facts found in his favor, they were not estopped by the finding. The court below held the record conclusive, and refused a new trial, and the decision was affirmed by the Supreme Court. They said that where relief was granted when, upon the facts found, there appeared to be an adequate remedy at law, the decree was merely erroneous, and not a nullity. The defendants, instead of objecting to the jurisdiction of the court, went to trial on the facts alleged by the plaintiff; and they could not now, in a collateral action, deny the jurisdiction of the court.

In Miller *v.* Mans,[5] the defendant pleaded a former recovery. The record showed that the former suit involved the same matters now in controversy; that a general denial had there been entered

[1] 12 Ala. 58.

[2] Weatherford *v.* Weatherford, 8 Port. (Ala.) 171; Oliver *v.* Hearne, 4 Ala. 271; Scott *v.* Yarborough, 5 Ala. 221; Van Horne *v.* Teasdale, 4 Halst. 379.

[3] 30 Conn. 425.

[4] 28 Conn. 582.

[5] 28 Ind. 194.

by the defendant; that the case had been referred to a commissioner, and a day in vacation appointed to hear the cause; that the plaintiff failed to appear on the day, and on the next day filed a dismissal; that at the next term the commissioner filed his report; and that, over the plaintiff's objection, and over his motion to have the dismissal entered, the court entered judgment upon the report against the defendant for costs. The court ruled that this was not a former recovery.[1]

The important case of Goodman *v.* Pocock[2] illustrates the doctrine of estoppel by election. This was an action in *indebitatus assumpsit* for work and labor done, etc. It appeared that the defendant had employed the plaintiff as a commercial traveller, from January 23, 1847, at £ 200 a year, payable quarterly, and had dismissed him from employment April 8, 1848. The plaintiff then brought an action for a wrongful dismissal; the declaration containing a count for the wrongful dismissal, and also the common counts for work and labor, money paid, and an account stated. Lord Denman having expressed an opinion that the plaintiff could not recover for the broken quarter after January 23, 1848, under his declaration, the jury returned a verdict for damages up to that time only. The plaintiff now sued again to recover under an *indebitatus* count for his services during the broken quarter; but the court held that the action could not be maintained.

Lord Campbell, while expressing regret at the fact, said that he had not the slightest doubt that, on legal principles, the action must fail. The plaintiff, on being dismissed, might have rescinded the contract, and have recovered *pro rata*, on a *quantum meruit*. But he had not done this; he had sued on the special contract, and had recovered damages for a breach of it. By this course he had treated the contract as subsisting; and he had recovered damages on that footing. With reference to the ruling of Lord Denman, in the former trial, the chief justice observed: "It is said that he recovered in that action in respect of no services except those of the past quarters. I receive with profound respect the opinion which the illustrious judge who tried the former action is said to have expressed; but I have a clear opinion, and I must act upon it, that the jury in assessing damages for the wrongful dismissal ought to have taken into the account the plaintiff's salary up to the time of his dismissal. It is said there is now no plea to

[1] See Van Vliet *v.* Olin, 1 Nev. 495. [2] 15 Q. B. 576.

raise the point. The plea of *non assumpsit* is quite sufficient; it obliges the plaintiff to show a debt due, and that could be only by showing that work was done for which payment could be claimed under the common count. Hartley *v.* Harman [1] is a different case. The contract was, not for a year, but at the rate of so much *per annum*, the engagement to be terminated by a month's notice on either side; and the special count was for not giving the month's notice, and not for a wrongful dismissal. There was no question of service rendered for a broken quarter, or for any other broken period; the service rendered was a complete performance of the contract; the contract was a completely executed contract so far as regarded the service."

In a recent English case,[2] the plaintiff, who had sued upon the same cause of action in a former trial, and had there confessed a plea of the defendant, when he might have replied, avoiding it, was held estopped to sue again and rely upon the fact which he might have used by way of replication in the former action.

Mr. Baron Bramwell said that it was his opinion — and upon this point the court were agreed — that the matter was *res judicata* as to everything which might have been controverted at the time the plaintiff made the confession. He was also of opinion — but upon this point there was some diversity — that if new circumstances had arisen, a fresh action might have been brought. And he said if, as in this case, there was a release operative at the time of the plea, but which had become defeasible by something occurring *subsequently*, a confession of the plea would not be *res judicata* as to the matter afterwards arising. And of this opinion was Mr. Justice Blackburn.[3]

In regard to the matter of form, the following plea was held good in a recent case.[4] The declaration was for an injury to the plaintiff's reversion; and the defendant, *inter alia*, pleaded that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said that, after the accruing of the causes of action in the first count alleged, and after the passing of the Chancery Regulation Act, the plaintiff commenced his suit and filed his bill in the High Court of Chancery against the defendant, and impleaded the

[1] 11 Ad. & E. 798.

[2] Newington *v.* Levy, Law R. 5 C. P. 607; affirmed, Law R. 6 C. P. 180 (1870).

[3] Martin, B., *contra*. See *ante*, pp. 96–112.

[4] Langmead *v.* Maple, 18 Conn. B. N. S. 255 (1865).

defendant therein for the very same rights, claims, and causes of action as in the said first count alleged; and such proceedings were thereupon had in the said suit, that, before the commencement of this suit, the said Court of Chancery determined the same alleged causes of action in favor of the defendant, and gave judgment, and decreed in respect thereof in favor of the defendant; and the said judgment and decree still remained in force.

The objection to the plea was, that it was not specific enough in the statement of the issue in the trial in chancery. Counsel contended that it was necessary to show that the matter did in fact come in issue, and that it was not enough to show that it *might* have come in issue, as they said was the case with the plea in question.

Willes, J., said that at first he had been disposed to think the plea bad. It was not sufficient to constitute *res judicata* that the matter has been determined; it must appear that the matter had been controverted as well as determined upon. "Looking at the pleas," he proceeded to say, "it seemed to me that probably the Court of Chancery may not have dismissed the plaintiff's bill on the merits, but, judging upon equitable grounds, may have considered it not to be a case for an injunction, and may have declined to go into the question whether the plaintiff had any legal right or not. It may have been unnecessary to go into that, except for the amount of damages. Therefore the Court of Chancery may have given the go-by to the right now asserted by the plaintiff. But, as the plea alleges that the Court of Chancery determined the same alleged causes of action, I think we are bound to assume it to mean that the court decided upon the legal merits against any right of action in the plaintiff in respect of those causes; and, as the court had jurisdiction, it might have made a final end of the matter. I can quite conceive that the first view may be the proper one to take on the evidence given. It may appear that the decree was upon the face of it final, and, either on the face of the decree, or on the evidence, if admissible, that the dismissal of the plaintiff's bill proceeded upon grounds peculiar to the Court of Chancery, and that this matter was not disposed of. But on looking at the plea, for the reasons mentioned, I think I must assume that the Court of Chancery did dispose of the legal merits, and that the plaintiff has no right to ask this court to come to a different decision on the same matter."

The case shows the importance of pleading the issue carefully and definitively, or, where special pleading has been abolished, the importance of strict proof that the precise matter has been controverted and determined.[1]

In respect to judgments of foreign countries, a plea of judgment recovered in a foreign nation must show that the court had jurisdiction, and that the judgment was final and conclusive when rendered.[2] And in the case of an action upon a foreign judgment, the declaration should set out the same facts.[3]

As to judgments of the sister American States, the same presumptions, according to the better authorities, will be made in favor of the record as in the State in which the judgment was rendered;[4] and it would seem to follow that the same rules of pleading should prevail in both cases. It has been held in a late case,[5] in an action upon a judgment rendered in another State, which would have been invalid by the law of the State in which it was sought to be enforced, that it must be shown that the judgment was valid when rendered. But whether it was necessary that this fact should be alleged in the declaration was not stated.

In the case of judgments of inferior courts, as there are no presumptions in their favor, the jurisdiction must be proved; and this is true as well of domestic as of foreign judgments.[6]

3. *Estoppel by Deed.*

Questions peculiarly of pleading and practice, in relation to estoppels by deed, have not arisen so often as in the other divisions of the subject, and we are unable to present the subject, as we should prefer to do, by the cases. The following are the most important matters.

Proof that the deed is not valid will remove any estoppel that might otherwise exist,[7] unless its invalidity is the result of some

[1] Judgment on a finding "that a strip of land sixty feet wide, running through" a certain block, was dedicated and accepted as a street, and "that there was no attempt by the authorities to encroach on any other than the sixty-foot strip," was held conclusive against a municipal corporation claiming any other part of the block as a street, in Ballard *v.* Appleton, 26 Wis. 67.

[2] *Ante*, pp. 216, 220 *et seq.*

[3] Ib.

[4] *Ante*, pp. 223 – 237.

[5] Crafts *v.* Clark, 31 Iowa, 77 (1870).

[6] *Ante*, pp. 151, 264; Cole *v.* Stone, Hill & D. 360; Thomas *v.* Robinson, 3 Wend. 267.

[7] *Ante*, p. 283.

defect peculiarly within the knowledge of the party who executed it, notice of which cannot justly be imputed to the other party.[1]

The deed does not have the effect of an estoppel in collateral actions.[2] Therefore, if a party bring trespass *quare clausum fregit*, and the defendant plead as an estoppel a deed made between the parties as to other premises, in which it is recited that the premises whereon the trespass alleged was committed belonged to the defendant, the plea will be bad on demurrer.[3]

There is no estoppel against a grantee in a deed-poll, except in the case of leases.[4] So if a deed be encountered by another instrument of the same rank, between the parties, and inconsistent with the former, the estoppel is removed;[5] and the same is true if other matters appear in the deed which explain, modify, or contradict the recital alleged as an estoppel.[6]

An estoppel cannot be alleged of a general and indefinite recital,[7] or of a recital of an immaterial fact,[8] but only of a particular specific recital.

Evidence is inadmissible, according to the weight of authority, to show that one who by a deed has professed to assume a certain relation and liability in fact intended to assume a different liability.[9]

If a party owning a particular estate make a lease of it for a term of years and before the term expires acquire the reversion, he may then show that at the time of making the lease he owned only a particular estate, which has since expired, and thereby avoid his own lease.[10] But he will not be permitted to show, in any case, that no interest passed, for that would be to contradict his deed.[11]

A party who executes a deed of all his right, title, and interest in real estate, with warranty, conveys only his present interest, and he may set up any after-acquired title which he may acquire;[12] but not if the warranty extend to future interests.[13] And if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized of a particular estate in the land,

[1] *Ante*, pp. 461–466.
[2] *Ante*, p. 286.
[3] See Carpenter *v.* Buller, 8 Mees. & W. 209.
[4] *Ante*, pp. 289, 372.
[5] *Ante*, p. 293.
[6] Ib.
[7] *Ante*, p. 295.
[8] *Ante*, pp. 312 *et seq.*
[9] *Ante*, pp. 319–321.
[10] *Ante*, p. 331.
[11] *Ante*, p. 327.
[12] Blanchard *v.* Brooks, 12 Pick. 47.
[13] *Ante*, pp. 335 *et seq.*

and the deed professes to convey it, evidence will never be received to show that he was not so seized at the time the conveyance was executed.[1]

4. *Estoppel in Pais.*

To establish an estoppel *in pais* by conduct, it is held that it must be shown: 1. That the party sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe, as a man of ordinary prudence, would influence his conduct, inconsistent with the evidence he proposed to give,[2] or the title he proposes to set up. 2. That the other party has acted upon, or been influenced by, such act or declaration. 3. That the party will be prejudiced by allowing the truth of the admission to be disproved.[3] And whether the conduct proved will work an estoppel is a question of law for the court to determine.[4]

In Platt *v.* Squire,[5] it appeared that Platt, a mortgagee of the land in question, represented to a third person, under whom the defendant claimed, that the debt for which the mortgage was given had been paid and satisfied, and that the third person was induced, by reason of the statement, to relinquish an attachment of the mortgagor's goods, and to take a mortgage of the same land to secure the debt. It was held that the mortgage under which the defendant claimed should take priority over that given to Platt;[6] and this, too, though Platt's mortgage was on record at the time of his misrepresentations.

Upon the last point the court said: "Nor is it any objection that the title of Platt was by a recorded deed. It is true that title by mortgage deed cannot be released by parol. But although the legal title might exist as a paper title, the party may not be able to enforce it, or render it effectual. This species of defence, when offered to control written conveyances or title-deeds, is no more obnoxious to the objection of permitting oral evidence to control written than exists in the ordinary cases of setting aside conveyances for fraud upon oral proof."

[1] *Ante*, p. 347.

[2] Bigelow *v.* Woodward, 15 Gray, 560; Mason *v.* Bair, 33 Ill. 194.

[3] Brown *v.* Brown, 30 N. Y. 519, 541; Plumb *v.* Cattaraugus Mutual Ins. Co., 18 N. Y. 392; Dezell *v.* Odell, 3 Hill, 215. For a more full statement of the elements of this estoppel, see *ante*, p. 480.

[4] Manning *v.* Cogan, 49 N. H. 331.

[5] 12 Met. 494.

[6] Fay *v.* Valentine, 12 Pick. 40; Dewey *v.* Field, 4 Met. 381.

In Favill *v.* Roberts,[1] the plaintiff brought an action for the purpose of procuring title to a farm which he had purchased of the executor of John Roberts, of whom the defendants were heirs. The land had been sold and paid for under an order of court, and improvements had been made by the plaintiff, when it was discovered that the court had no authority to grant the order for the conveyance of the land. The plaintiff now sought to enforce a remedy against the heirs at law, and to compel a conveyance, on the ground that the executor acted with the consent and approbation of the heirs, and that they encouraged the sale. It was held that the plaintiff was entitled to his remedy.

In Jones *v.* Cowles,[2] a bill was filed in chancery to restrain Cowles from asserting the legal title to certain lands, alleged to have been sold to one Ware, under whom the plaintiff claimed, on the ground that he had placed himself in a position which estopped him from asserting such title against the plaintiff. The charge was that the plaintiff's grantor, Arnold Seales, purchased the lands in question of Ware for the sum of $4,000, for which notes were given and a bond for title received. The bill then proceeded as follows: "Your orator further saith that he is advised and believes that before the said contract of purchase was consummated, the said Thomas M. Cowles, in whom was the legal title, as your orator is informed, said to the said Arnold Seales and Robert J. Ware, that the said Ware might sell the said lands to the said Seales, and that he (the said Cowles) would look to the said Ware for the payment of the same; and that the said Cowles in fact stood by and gave his assent, as he believes, to the sale of said lands by the said Ware to the said Seales, he having been advised at the time that a contract had been agreed upon, which was to become effectual if he (Cowles) should approve or sanction the sale, which he did do." The bill then stated that Seales had been induced, by the statement made by Cowles, to enter upon and purchase the land; that Seales sold to the plaintiff, and that the plaintiff made the purchase, and made valuable improvements on the land, on the faith of the assent of Cowles to the sale by Ware. The bill was dismissed.

Mr. Justice Goldthwaite, in delivering judgment, now said: "It will be seen from the statement we have made of the bill,[3]

[1] 3 Lans. 14.

[2] 26 Ala. 612.

[3] From which the above statement is taken.

that the equity of the appellant rests entirely upon the conduct of Cowles in giving his assent to the sale by Ware to Seales; and hence it is necessary that the fact should be clearly charged in the bill. But the bill is defective in this, as the fact of the assent is not charged at all. The allegation, as will be seen from the extract we have made, simply is that the complainant was advised and believed that such assent had been given, and this is not enough.[1] If the allegation we have referred to is struck out, there is no other which would create any estoppel on the part of Cowles. But if the fact which we suppose was intended to be charged had been charged with sufficient certainty, we think the injunction was properly dissolved on the answer of Cowles. In this aspect, the facts out of which the supposed equity of the appellant arises are that there was a contract between Ware and Seales for the sale of the land, which was to become effectual if Cowles, who had the legal title, should approve and sanction the sale; that Cowles, on being advised of the contract, gave his assent to the sale, and said that he would look to Ware for the purchase-money; and that Seales and the appellant acted upon the assent thus given, and the statement thus made. Cowles, in answering in relation to this matter, states that in the fall of 1849 he had agreed verbally to sell the land to Ware for twelve hundred and fifty dollars, one half to be paid on the 1st of January, 1850, and the other half in January, 1851; and that afterwards, Seales being in treaty for the purchase of the land from Ware, they called on him, and inquired if he recognized the validity of the verbal contract, — considered it a binding one, and was willing that Ware should sell the land to Seales; and that he replied that he did recognize the validity of the verbal contract, regarded it as a binding one, was willing that Ware should sell the land to Seales, and that he would look to the former for the purchase-money; and he denies, expressly, that he on any other occasion made use of such language, or that he thereby intended to surrender any right to look to the land as a security for the purchase-money due to him from Ware, or that it was his intention to do more than recognize the validity of the verbal sale made by him to Ware. Taking the answer of Cowles as true in relation to this matter, to which it is in response, the case is brought directly

[1] See Read *v.* Walker, 18 Ala. 323; McDowell *v.* Graham, 3 Dana, 73.

within the influence of Ware *v.* Cowles.[1] Cowles had the right to look to Ware, as well as to the land, for the payment of the purchase-money; and unless it clearly appeared from his statements that he intended to relinquish his lien upon the land, no one had a right to give that interpretation to them. The law will not create an estoppel by argument or inference. The sanction of the sale by Ware we regard as amounting to no more than the recognition of his verbal contract. It was the same as if he had said, I have sold to Ware, keeping the title in myself, and he may sell to whom he pleases. We say that this was the effect, because Seales knew that Cowles retained the title. Surely there was nothing in this from which it could reasonably be inferred that Cowles intended to part with his lien. But he went further, and said that he would look to Ware for the purchase-money. Taking all the circumstances into consideration, we cannot say with any certainty that by this he meant that he would look to Ware alone. We should rather suppose that his meaning was, that although the sale was a verbal one merely, yet he recognized it as binding, and should look to Ware, to whom he had sold, to pay the purchase-money. This, we think, is a more reasonable inference than to suppose he intended, without any inducement, to give up a substantial right. The law forbids us, in doubtful cases, to give such a construction to language in order to raise an estoppel."

It has been held that the doctrine of estoppel by conduct, where the subject of the representation is real estate, or property which can only be passed by deed, is not available in a suit at law.[2] The case first cited was an action of ejectment. The plaintiff being seized in fee of the land in controversy, sold it to one Bird, and gave bond to make title on payment of the purchase-money, secured by the purchaser's notes. One of these notes the plaintiff indorsed to the defendant, who obtained judgment upon it against the purchaser, who was in possession of the land, and, under the instructions of the plaintiff, had the execution levied on the land, and at the plaintiff's request purchased it. Afterwards the plaintiff paid the residue of the notes which he had indorsed, and filed a bill in chancery against the purchaser, Bird, and had the land sold in

[1] 24 Ala. 446.

[2] Doe d. McPherson *v.* Walters, 16 Ala. 714; Smith *v.* Mundy, 18 Ala. 182; Hamlin *v.* Hamlin, 19 Maine, 141; Knight *v.* Wall, 2 Dev. & B. 125; West *v.* Tilghman, 9 Ired. 163; Blake *v.* Fash, 44 Ill. 302; Mills *v.* Graves, 38 Ill. 455; Swick *v.* Sears, 1 Hill, 17; Delaplaine *v.* Hitchcock, 6 Hill, 14. See Heard *v.* Hall, 16 Pick. 460; Foster *v.* Bigelow, 24 Iowa, 379.

payment of the purchase-money. The defendant was not a party to these proceedings. The plaintiff became the purchaser at the sale under the decree, and now brought the present action to recover the land. Upon this evidence, the court below instructed the jury that the plaintiff was estopped to assert his title against the defendant; but this judgment was reversed by the Supreme Court.

The point is important, and we quote extensively from the opinion of the court. Dargan, C. J.: "The plaintiff was seized in fee of the premises, and he has executed no deed by which he has transferred the title to another. This is admitted; but it is contended that the conduct of the plaintiff, in directing the levy to be made on the land, as the property of Bird, the purchaser, who held his bond for title, and requesting the defendant to buy, estops him from asserting his legal title, more especially as the amount bid at the sheriff's sale by the defendant extinguished, to that extent, the liability of the plaintiff as the indorser of the note of Bird to him. If any one having the title to land induce another to purchase it from one who has no title, it is very certain that the legal owner cannot be permitted afterwards to assert his title and defeat the purchaser.[1] But the question is, In what forum shall the purchaser defend himself? Can he defend at law, or must he resort to equity for protection?

"If the defendant had been the purchaser from the plaintiff, had he paid the full price of the land under the promise that the plaintiff would forthwith make him titles, — if this promise had been made with a fraudulent intent on the part of the plaintiff to obtain the purchase-money, and then assert his legal title, yet the defendant could not defend himself at law against the legal title, and would be compelled to resort to a court of equity for protection. If a court of law could not protect the defendant in the case supposed, I do not see how it could if the plaintiff, having the legal title, fraudulently induced the defendant to purchase at sheriff's sale under an execution against one who had no title that could be sold. The title to land can pass only by deed; and an estoppel at law, which works a divestiture of title, can be created, in my opinion, only by as high evidence. I have looked with some care into the English cases, but I have not found one in which a plaintiff at law was held to be bound by a parol estoppel,

[1] Sugden, Vendors, 262.

when the subject-matter was such that the title could pass only by deed. If the title could pass by delivery or by parol, then a party shall be bound by a parol estoppel, and cannot be permitted, after he has induced a party to act upon a supposed state of facts, to show that these facts are untrue, to the prejudice of him who has acted on his representations.[1] In the case of Hamlin *v.* Hamlin,[2] it is said that 'no verbal agreement respecting land can create an estoppel at law, for the title to land can pass only by deed, and no man can be barred of his right to land by way of estoppel, unless by record or deed.' In North Carolina, the title to slaves can only pass by instrument in writing; and in the case of Knight *v.* Wall [3] it was decided that title to slaves could not be made out at law by a parol estoppel; and if fraud had been practised on the party, he must seek redress in equity, but that such fraud could not at law convey to him the legal title. The cases of Bolling *v.* Petersburg,[4] Heard *v.* Hall,[5] Marshall *v.* Pierce,[6] and Hamlin *v.* Hamlin,[7] seem also to recognize the doctrine that the owner, at law, is not estopped from asserting his legal title to the land by a fraud committed by him on the defendant, and who, in consequence of the fraudulent acts of the plaintiff, has been induced to buy from one who had no title. I admit that cases may be found in the reports of some of the States of the Union that seem to countenance a contrary doctrine. But when we reflect that a court of law can look only to the legal title, and that the legal title to land cannot pass by parol in this State, it is difficult to perceive how a plaintiff at law shall be estopped from asserting his title merely because of his fraudulent acts or conduct, which render it inequitable or unjust for him to assert. If a court of law, because of such conduct or acts, should stop short and refuse to give effect to the legal title, would it not be on account of the equities of the defendant? Yet we know that a court of law will not look to or consider the equity of a party in opposition to the legal title of the other. The better course, in my opinion, is to pursue the well-settled rule of law, and to permit the legal title to prevail at law, regardless of the equity the opposite party may have, and leave him to enforce his equita-

[1] Pickard *v.* Sears, 6 Ad. & E. 469; Heane *v.* Rogers, 9 Barn. & C. 577; Graves *v.* Key, 3 Barn. & Ald. 318.
[2] 19 Maine, 141.
[3] 2 Dev. & B. 125.
[4] 3 Rand. 563.
[5] 16 Pick. 460.
[6] 12 N. H. 127.
[7] 19 Maine, 141.

ble rights in a court of chancery, which has power not only to arrest or enjoin the suit at law, but also to decree a conveyance of the legal title to him who in equity is entitled to it." [1]

The learned chief justice, referring to the cases of parol dedication, said that they were not in point, by reason of the character of the grantee, the public, who was intended to be benefited by the act.

Laying out of view the question whether the facts in this case, other objections aside, were sufficient to raise an estoppel, — which seems doubtful, — and assuming that they were sufficient, we cannot but think that the learned court took an erroneous view of the case. The infirmity of the argument lies in the assumption of the court that to allow the estoppel would be to pass a title by parol; but we submit that this would not be the effect of such a ruling. We have seen that even in the case of estoppels by deed there is no actual transmission of title (with some possible exceptions) in our modern conveyances with warranty, in respect to after-acquired interests. The principle of estoppel, unlike the estoppel of the early common law, is nothing more than that of rebutter. The grantor is estopped, on the principle of preventing a circuity of action, to claim the land under an interest subsequently acquired.[2]

The principle we conceive to be the same in the case of the parol estoppel. There is no transmission of title,[3] — the Statute of Frauds would prevent this, if nothing else would; but the party who has made the representation is simply precluded from denying the truth of his representation; and, it would seem, in order to prevent circuity of suit. If he were to be permitted to contradict his representations, and to show that they were false and fraudulent, and recover the land, the other party would then be entitled to an action against him for the deceit.

The court speak of the estoppel as an equity, and say that a court of law cannot consider the equities of the defendant as against the plaintiff's legal title. But we conceive that the term "equity," if proper at all, means merely "defence," as in negotiable paper, and not an interest in the property. The estoppel is simply a preclusion upon the one party to assert his title against

[1] See also Warner *v.* Middlesex Mutual Assur. Co., 21 Conn. 444.

[2] *Ante*, pp. 355 *et seq.*

[3] But see McCaa *v.* Woolf, 42 Ala. 389.

the other; but no doubt the party estopped may assert it against third persons.

The distinction which the court allude to, in order to show that cases of dedication are inapplicable, seems to us unsound. What difference it can make with the case, that the grantee is the public, it is difficult to understand. How can the public have a better claim to an estoppel than an individual? We think the case of dedication precisely applicable, not because the estoppel has operated as an actual transmission of title to the public before the Statute of Limitations has affected the case, but because it would be unjust for the party to assert his title after the public have proceeded to acquire rights on the faith of the dedication. True, a subsequent grantee could not in this case take the property free from the estoppel; but this, we conceive, is because he has notice of the state of the title, and not because the title has passed out of the grantor.

This position is supported by authority.[1] In Connecticut the Supreme Court, in the case first cited, have said, in reference to the position that a parol estoppel cannot prevail in the case of real estate: "This certainly is not the common law. Littleton says: 'And so a man can see one thing in this case, that a man shall be estopped by matter in fact, though there be no writing by deed, indenture, or otherwise'; and Lord Coke, commenting thereon, gives as an instance of estoppel by matter in fact this very case of partition.[2] And such an award [one by parol] has in England been held sufficient to estop a party against whom ejectment was brought from setting up his title."[3]

The Supreme Court of Alabama say: "We understand the general rule to be well settled that where one knowingly suffers another, in his presence, to purchase property to which he has a claim or title, which he wilfully conceals, he will be deemed, under such circumstances, to have waived his claim, and will not afterwards be permitted to assert it against the purchaser or his privies;[4] and this principle may be asserted in relation to personal

[1] Brown *v.* Wheeler, 17 Conn. 345; Pool *v.* Lewis, 41 Ga. 162; Burkhalter *v.* Edwards, 16 Ga. 593; Davis *v.* Davis, 26 Cal. 23; McAfferty *v.* Conover, 7 Ohio St. 99; Spears *v.* Walker, 1 Head, 166; Dodge *v.* Stacy, 39 Vt. 558; Halloran *v.* Whitcomb, 43 Vt. 306; Spiller *v.* Scribner, 36 Vt. 245; Smith *v.* Hall, 28 Vt. 364; Shaw *v.* Beebe, 35 Vt. 205; Gove *v.* White, 23 Wis. 282; Mariner *v.* Milwaukee & St. Paul R. Co., 26 Wis. 84.

[2] Coke Litt. 356.

[3] Doe d. Morris *v.* Rosser, 3 East, 15.

[4] Watson *v.* McLaren, 19 Wend. 557;

property.[1] . . . . The reason of the rule is founded on the moral duty which devolves upon the person having the claim, if present, to make it known to the purchaser; and failing to assert it at a time when common honesty required him to do so, the law will not allow him afterwards to insist upon it, against him whose purchase may be attributed to his culpable silence. . . . .

"It is, however, urged by the counsel for the plaintiff in error that *mere* silence is not sufficient to authorize the application of the rule; that it must be a *deceptive* silence, and that the proof that it is so lies upon the purchaser. It is unquestionably true that it devolves upon the purchaser to establish the fact upon which the validity of his own title depends; and, under the rule which we have laid down, the silence of a person, to amount to the waiver of a claim on his part, must be wilful; and it necessarily follows that the character of the silence which is essential to invalidate the claim set up, and thus render his own title good, must be established by the purchaser. But this character requires no positive proof, and may be inferred by the jury, whenever the surrounding circumstances are such as to warrant the belief that the silence of the party having the title or claim to the property was incompatible with innocence of intention or object."[2]

The subject of election is illustrated in Dalton *v.* Whittem.[3] This was an action of trover for "certain goods and chattels, to wit, two metal counters," etc. On the trial it appeared that the articles referred to were fixtures attached to a house, of which the plaintiff was tenant under the defendant, and that they had been severed in a distress for rent, and disposed of. For the plaintiff it was contended that the fixtures could not be taken under a distress for rent. Counsel for the defendant, admitting this, contended that for such taking trespass was the proper remedy, and that the plaintiff could not bring trover without waiving the tortious severance, and treating the articles as chattels. But the court held the action proper.

"The defendants cannot say," said Lord Denman, C. J., "that the articles which they have distrained for rent are not goods and chattels. They say, however, that if the articles are chattels, the distress is lawful. That is not a correct view. They cannot com-

Bird *v.* Benton, 2 Dev. 179; Storrs *v.* Barker, 6 Johns. Ch. 166; Wendell *v.* Van Renssalaer, 1 Johns. Ch. 354. See also *ante*, pp. 501 *et seq.*

[1] Heane *v.* Rogers, 9 Barn. & C. 586.

[2] See Vilas *v.* Smith, 25 Wis. 310.

[3] 3 Q. B. 961.

mit the wrong of severing the fixtures from the realty, and then take advantage of such wrong and treat them as goods and chattels for the purpose of distress."

The position of Mr. Justice Coleridge was, in substance, thus stated: The plaintiff says that the articles are now goods and chattels, and therefore trover lies; but the defendants have wrongfully made them such, and may not defend their distress by an unlawful act. It was like the case of money had and received, where the plaintiff's goods had been wrongfully taken and sold. The action, to a certain extent, assumed the legality of the sale; but still the plaintiff might say that the property was not in the vendor.

In an action for deceit against a tinner, who followed the business of putting tin roofs on houses, for falsely and fraudulently representing that he would put a tin roof on the plaintiff's house which would not leak for twenty years, whereas the roof did leak within two years, a partial payment made by the plaintiff, after discovering that the roof leaked, without making the objection, is a circumstance to be weighed by the jury in determining whether any fraud was practised by the defendant; but it cannot operate as an estoppel *in pais*, or as a release or waiver of an existing cause of action.[1]

The rule that a party shall not dispute the validity of documents which he has produced or has been required to inspect, on notice, at the trial, seems to rest, in some cases, on the notion of prejudice to the other side. In Doe d. Wright *v.* Smith,[2] the plaintiff gave the defendant notice, under the rules, that he might inspect and would be required to admit a "counterpart of lease." The instrument produced, though indorsed as a "counterpart," was executed as a lease; and the defendant thereupon objected to receiving it. The objection was overruled.

"It is also said," Mr. Justice Coleridge observed, "that the defendant is not proved to have inspected any document at all; but he is not competent to allege this. If, having opportunity given, he did not inspect, he stands in the same situation as if he had. The instrument in question was indorsed 'counterpart'; if he looked at it, that would stare him in the face; and at any rate he must have seen the paper described as a counterpart in the plaintiff's notice. Then was he not bound to make his objection at the time when inspection was offered? If he had then said, I cannot

[1] McGar *v.* Williams, 26 Ala 469. [2] 8 Ad. & E. 255.

admit this as a counterpart, he would thereby have given the opposite party notice to prove that there was an original properly stamped. By the conduct now pursued, he has lulled asleep the caution of that party, and he must be taken to have said, I agree to admit the instrument in the manner in which you have described it. It is asked what would be the case if a probate were mentioned in the notice, and nothing produced but a plain paper. Such a paper could never have been a probate at all; it manifestly wants the legal authority; but the instrument here produced may have been a counterpart, and would not cease to be so because the landlord signed it. There is no similitude between the case supposed and the present. This is a case in which we may say that a party, having consented to admit the execution of an instrument in a particular character, shall not afterward object that the instrument has not that character."

So, again, in the case of Regina *v.* South Holland.[1] This was an application for a *certiorari* to bring up an inquisition held before a compensation jury, on the grounds of improper notice and improper and inadequate compensation. The application was refused for reasons stated by the judges.

Lord Denman said that the ground of his decision was, that the party had rendered himself incompetent to make the objections. They could not doubt that the inquisition would have been free from the defect of notice complained of, if the party himself had not waived the notice, and requested for his own benefit that the inquiry might take place at an earlier period than that which a regular notice would have assigned.

As to the objection that the jury had awarded a smaller compensation in money, he said this was open to the same objection; for the party had discussed the amount of the estimate on the supposition of the changes proposed, and had waived his right to a full money compensation.

The case of Regina *v.* Salop[2] contains another instance of this sort of estoppel. It appeared in this case that an order had been made adjudging the settlement of a pauper to be in the parish of H.; whereupon the overseers of H. gave notice of an appeal to the next Borough Sessions for S. Both parties appeared at the trial of the appeal, and it was decided that the court had no jurisdiction, and that the appeal should have been taken to the County

[1] 8 Ad. & E. 429.

[2] 4 El. & B. 257.

Sessions. Having decided that no valid notice of appeal had been given, the question was now raised in the Queen's Bench, on a rule for a *mandamus*, whether, in the original notice of appeal, the mention of the *Borough* Sessions could be treated as surplusage; and it was held that it could not.

Lord Campbell, C. J., said that counsel had succeeded in distinguishing the case from Regina *v.* Liverpool,[1] on which the court had just acted in Regina *v.* Buckinghamshire.[2] In Regina *v.* Liverpool, the appellants, having given a notice of appeal, in which, by mistake, they said that the appeal would be to the County Sessions, had discovered their error before any step had been taken in consequence, and had informed the other side that the appeal would be to the Borough Sessions. There had, therefore, been nothing in the circumstances of that case to preclude the respondents from saying, as they had done, that the mention of the County Sessions was mere surplusage, which could not mislead. But in the present case, the respondents had given notice of appeal to the Borough Sessions, and had then appeared there. They treated it as an appeal to the Borough Sessions, tried to obtain the benefit of it as such, and were defeated, and they could not now be allowed to say that the mention of the Borough Sessions had been a mistake, and that the intention was to appeal to the County Sessions.[3]

In Walrath *v.* Redfield,[4] the plaintiff brought an action to test the right of the State to a permanent appropriation of water from a certain feeder of the Erie Canal. It appeared that the defendant, a superintendent of repairs on the canal, having built a dam which caused the injury complained of, declared to a third person that he had done so to bring up the question of the right of the State to the permanent use of the water. It seems that the plaintiff had by statute a remedy for the temporary appropriation, but that he was induced by the defendant's declaration to bring the present action. The court below instructed the jury that if the defendant took the water, as he said he had done, as a permanent appropriation, he could not defend himself upon the ground of a temporary appropriation. To this instruction the defendant objected; but it was sustained by the Court of Appeals.

[1] 15 Q. B. 1070.

[2] 4 El. & B. 260.

[3] See also London and Northwestern Ry. Co. *v.* Bedford, 17 Q. B. 978.

[4] 18 N. Y. 457.

"The jury were not instructed," said Selden, J., speaking for the court, "that the mere declaration of the defendant that he took the water under a claim of right on the part of the State to the permanent use, would *per se* preclude him from justifying upon the ground of a temporary appropriation. The position assumed by the plaintiff's counsel upon the trial, as it is fair to presume from the evidence given, was, that if the defendant had taken the water avowedly under a claim of permanent right in the State, and had thus misled the plaintiffs and induced them, instead of obtaining an appraisal of their damages, as in cases of temporary appropriation, to bring this suit for the purpose of testing the right claimed, then the defendant would be estopped from now changing his ground. The correctness of this position cannot be doubted. Such being the facts, it would be a palpable case for the application of the principle of estoppel *in pais*. The case of Lynch *v.* Stone,[1] as it seems to have been understood by the court, does not hold the contrary. It is evident from the opinion of Chief Justice Bronson, in that case, that he regarded it as having been so clear that the water was actually taken as a mere temporary appropriation, whatever the commissioner might have said; that no one could be misled by his declarations on the subject. It was no doubt the doctrine of estoppel *in pais*, as above explained, that the charge of the judge was intended to inculcate. . . . . Perhaps the most plausible objection which could be made to this part of the charge is, that it does not in terms say that it is essential to the estoppel that the plaintiffs should have been led to suppose that the defendant had taken the water under claim of a right to its permanent use, and should have acted on that supposition. This objection, however, is not made by the defendant's counsel, nor do I think it could be sustained if made. The idea must have been clearly developed in the course of the trial and of the arguments of counsel, and was plainly implied in what was said when taken in connection with the nature of the action and the evidence which had been given."[2]

It seems to be in strict accordance with the principle in these cases, that where a party has, upon notice, refused to produce a writing in his possession, and thereby caused the opposite party to

[1] 4 Denio, 356.

[2] These principles are no doubt correct, but the defendant's statement was made to a stranger, — a fact apparently not noticed by the court.

give secondary evidence of its contents, he will himself be precluded from producing it in evidence.[1]

An early case before Lord Holt[2] illustrates the doctrine of estoppel by pleading. It was a writ of error *coram vobis* to reverse a former judgment in an action between the parties, in which there had been a verdict and judgment for the plaintiff. The error assigned was that the assumed plaintiff in the former action had died before the trial of that issue, and upon this there was issue to the country. The plaintiff in error then offered to prove that the former plaintiff, being a seaman, had died several years before the action had been brought. But Lord Holt said that he was estopped to give in evidence the plaintiff's death before the principal action, for by his plea he had then admitted him to be alive. And he cited a case where a tenant in tail had acknowledged a judgment or recognizance, and died. Upon a *scire facias* against his heir and terre-tenant, the sheriff returned service, and there was judgment by default. And in ejectment it was ruled that the issue in tail could not give in evidence that the conusor was only tenant in tail, because he might have pleaded it to the *scire facias*.[3]

In another early case,[4] the defendant in replevin avowed that the place where the taking was alleged was parcel of the manor of K., his (defendant's) freehold. The plaintiff replied that the place was parcel of the manor of K., and made title to it. He then offered evidence that the defendant had no manor of K.; but the court held him estopped by his plea from showing that the defendant had no such manor, for his plea admitted it. The court said it was confessed that K. is a manor, and it could not be understood the manor of K. of which the plaintiff spoke, but must of necessity mean the manor of which the defendant had spoken in his avowry. And the court added: "But the good and prudent form had been to say, *protestando* that the defendant had no such manor."

So if a person is indicted by his right name and he pleads a misnomer in abatement, and he is then indicted again, he is estopped by his former plea to say that the name he there gave himself was not his right name.[5]

[1] Doe d. Thompson *v.* Hodgson, 12 Ad. & E. 135.

[2] Lambert *v.* Cameret, Comb. 446, Anno 1697.

[3] Probably Gilburn *v.* Rack, 2 Sid. 12; S. C. 2 Ld. Raym. 1051.

[4] Dyer, 183, pl. 58.

[5] Dictum of Powell, J., in Regina *v.* Stedman, 2 Ld. Raym. 1307. See Stroud *v.* Gerrard, 2 Salk. 711.

In the case of Meredith *v.* Davies,[1] the plaintiff in error argued that the defendant was estopped, after having pleaded *in nullo est erratum*, from praying that the court would award a *certiorari* for diminution of the record; and that though the court might award a *certiorari* in order to be certified of the out-branches of the record (as the original writ or warrant of attorney), which are not returned with the body of the record upon a writ of error, but were certified in another roll; still the court could never do it to be certified of anything in the body of the record. They must suppose it to be returned as it ought to be, and must take it as it is, and were concluded by the admission of the parties from taking it to be otherwise. Counsel on the other side admitted that the defendant in error was estopped; but it was argued that the estoppel did not reach the court, for the writ of error was itself a commission to examine such errors as were manifest on inspection. And the court for the reasons given made a rule for a *certiorari*.

The case of Morgan *v.* Vaughan[2] belongs to this subject. In that case Morgan brought a writ of error, alleging that Vaughan had obtained judgment against him six years before, whereas he (Morgan) was then an infant of fourteen years, and appeared by attorney, instead of by guardian, as he stated he should have appeared. Verdict having been given for Morgan on the question of infancy, counsel for the other side now moved in arrest of judgment on this ground: The writ of error had alleged that Morgan was but fourteen years of age when the prior action was brought, and that was six years ago. Error now being assigned by attorney, it was contended on the other side he was estopped by his own showing. In other words, if he could not appear by attorney at fourteen, as he contended, he could not now at twenty, being still a minor. But the objection was overruled by the whole court.

The judges said that there was no estoppel, because the allegation of the precise age was idle and not traversable, and the plaintiff in error might have alleged any other day, and the defendant could not have taken issue upon it. A case[3] was cited where, the lord having distrained cattle, the tenant under a lease for sixty years pleaded a lease for ten years, and after the expiration of the

[1] 1 Salk. 270.
[2] T. Raym. 456.
[3] 3 Dyer, 289, b, pl. 59.

ten years, the reversioner having entered, the tenant pleaded his lease of sixty years; and the court resolved that he was not estopped by pleading his lease to be but for ten years, because the lease, not the number of years, was material.[1]

The court finally stated the rule to be that one should not be estopped but of that of which he might have a traverse.

The recent case of Rossie *v.* Bailey[2] will also illustrate the subject of estoppel in pleading. In this case, it appeared that the plaintiff was, on the 27th of February, the holder of two dishonored acceptances of the defendants, and that he had not assented to a composition deed made on the day above named, but which had been assented to by the requisite number of creditors, and duly registered.[3] On the 15th of April, after one of the instalments agreed in the deed to be paid had become due, the present action was brought to recover the amount of the two bills. It appeared also, in the midst of conflicting affidavits, that the defendant had tendered payment of the instalment on one of the bills, and was consequently in a position to support a plea founded on the deed as to that bill, but that he had not tendered payment of the instalment in respect of the other bill, and could not consequently have supported a plea founded on the deed as to that bill. He did not plead as to either. Judgment was signed as to both, and execution issued, and the goods of the defendant were seized. A sum sufficient to cover the levy having been paid into court, counsel for the defendant now obtained a rule calling upon the plaintiff to show cause why the money should not be paid back to him, on the ground that the deed of composition had been duly complied with, and that he was not bound to plead it. But the court held that the defendant was now estopped by his failure to plead his defence.

The authorities on the point had been in considerable confusion, as Mr. Justice Blackburn showed, in delivering the judgment. "In Whitmore *v.* Wakerley,"[4] said he, "the deed was registered on the 9th December, and judgment signed on the 20th, under which the debtor's goods were seized. The Court of Exchequer

[1] See another case referred to from Fitzh. Estoppel, 69. Rescous.

[2] 8 Best & S. 748 (1868).

[3] Under the Bankruptcy Act of 24 & 25 Vict. ch. 134, §§ 197, 198, which gives a debtor, who has registered a valid composition deed, a protection analogous to that in bankruptcy.

[4] 3 Hurl. & C. 538.

gave this brief judgment, 'We are all of opinion that, as the defendant did not plead when he had the opportunity, he cannot avail himself of it now.' This is directly in point, and an authority in favor of the plaintiff. But in Hartley *v.* Mare[1] the Court of Common Pleas decided the other way. It is true it appears that the case of Whitmore *v.* Wakerley (which had not been then reported) was thought by them to be no more than a decision that the *fieri facias* could not be set aside, not that it might be made available; and it is also true that the form of the proceeding was an interpleader under which the inspectors claimed the goods as their property, just as the assignees of a bankrupt would do in case of execution before the order of discharge. But though these observations may diminish the weight of authority, it still seems clear that the Court of Common Pleas thought, though the debtor had had the opportunity to plead the deed, he, as well as the inspectors, might afterwards use it to prevent the execution being available. In Braun *v.* Weller[2] the special circumstances rendered it unnecessary to determine 'whether under any circumstances the omission to plead in bar to an action deprives the defendant of any benefit to which he may be entitled under the provisions above referred to.' . . . .

"In this state of the decisions, the point was brought before the Court of Exchequer in Staffordshire Banking Company (limited) *v.* Emmott,[3] and the court there was equally divided in opinion. We must therefore decide the point for ourselves, without being fettered by authority, though knowing that whichever way we decide we have learned opinions of equal weight with us and against us. After carefully considering the reasons given by the learned barons, we have come to the conclusion that this rule should be discharged. We agree with Channell, B., that the general rule of law is, that the party who might have pleaded and prevented a judgment, and did not, is estopped from afterwards raising that defence,[4] and that as the Legislature might have enacted that this doctrine of estoppel should not apply, the real question is whether they have so enacted; and we think they have not."

In Boyle *v.* Webster,[5] the plaintiff declared against two defend-

[1] 19 Com. B. N. S. 85.
[2] Law R. 2 Ex. 183.
[3] Law R. 2 Ex. 208.
[4] See also Newington *v.* Levy, Law R. 5 C. P. 607; affirmed, Law R. 6 C. P. 180.
[5] 17 Q. B. 950.

ants on joint promises. The defendants severed in pleading, and one entered a plea of infancy. The plea was admitted, and a *nolle prosequi* entered as to that defendant; but the plaintiff entered issues as to the pleas of the other defendant, and proceeded to trial against the objections of the opposite party that the plaintiff should be nonsuited. The Queen's Bench held that this should not have been done.

It was true, Lord Campbell observed, that the *nolle prosequi* admitted only the plea to which it was pleaded. But the effect of that plea was that there was no contract by the defendant who pleaded it; and this the plaintiff had admitted. "How, then," said the Lord Chief Justice, "can he say afterwards that both promised? He himself has furnished conclusive evidence to the contrary."

This, it will be observed, is the same subject, considered from the aspect of pleading, which has already been presented at length as *res judicata*.[1]

If a party affirm a contract by suing upon it and obtaining judgment, he will not be permitted thereafter to deny its validity.[2] So, too, since a recovery of judgment in trover for the conversion of a chattel bailed establishes a rescission of the contract, the plaintiff will thereafter be estopped from suing on the contract.[3]

It is held, also, that the question whether a company has been properly incorporated cannot be raised after it has been impleaded as a corporation, and recognized as such in decrees made in the cause.[4]

In Greenville and Columbia Railroad Company *v.* Joyce,[5] the defendant, sued as an executor, pleaded the Statute of Limitations. At the trial, he endeavored to show that the plaintiff was not entitled to the full time allowed in actions against executors, as he, the defendant, was an executor *de son tort;* but the court held him estopped by his pleading to allege that he was not a rightful executor.

The party who has committed a fault in pleading, which has not been noticed by the other side, cannot object that the other side

[1] *Ante*, pp. 47 *et seq.*

[2] Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228. See Fishmongers' Co. *v.* Robertson, 5 Man. & G. 131, 192; Copper Miners' Co. *v.* Fox, 16 Q. B. 229, 237; Green *v.* Russell, 5 Hill, 183.

[3] Deens *v.* Dunklin, 33 Ala. 47.

[4] Howard *v.* LaCrosse & M. R. Co., Woolw. 49.

[5] 8 Rich. 117.

has followed the defect.[1] In the case cited, the defendant to an action by an indorsee against him as acceptor of two bills of exchange pleaded that the bills had been accepted for the accommodation of the drawer; that after they were due, the drawer gave the plaintiff other bills of larger amount, for which the plaintiff agreed to give him time as to the bills now sued upon; that new bills were given in payment of the bills now sued upon; and that the transaction was unknown to the defendant. To this the plaintiff replied, *de injuria*. The defendant now demurred, on the ground that the replication attempted to put in issue two matters of defence; but the demurrer was overruled.

In the course of the argument, Patteson, J., said to counsel for the defendant: "You attempt to set up a plea which you allege to be bad, because, as you contend, the plaintiff has made a bad replication. If your plea is double, and there is a general replication, you cannot take advantage of the fault of your plea to make the replication bad."

A party is estopped to make an objection inconsistent with his cause of action.[2] The case cited was an action for money had and received against a sequestrator, for the purpose of impeaching the sequestration; and it was held that the plaintiff could not insist that he had vacated the benefice of W., by adopting that of C., when it was necessary to the maintenance of his action that he should be an incumbent of W.

[1] Reynolds *v.* Blackburn, 7 Ad. & E. 161.

[2] Daniel *v.* Morton, 16 Q. B. 198.

CHAPTER XXII.

PRECEDENTS IN PLEADING.

We present, in conclusion, the following approved precedents in pleading by way of estoppel. The first three forms are taken from Chitty's Precedents in Pleading;[1] the fourth form is from the report of the celebrated case of Outram *v.* Morewood,[2] before Lord Ellenborough; and the rest are from Bullen and Leake's Precedents.[3]

1. *Commencement and Conclusion of a Plea of Matter of Estoppel.*

The defendant by ——, his attorney [or in person], says that the plaintiff ought not to be admitted to say [stating the matter to which the estoppel relates], because he says [state the matter of estoppel and conclude]. And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to be admitted against his own acknowledgment by his deed aforesaid [or otherwise, according to the estoppel] to say [stating the matter to which the estoppel relates, as before].

2. *Replication by Way of Estoppel to a Plea.*

That the defendant ought not to be admitted to plead the said plea by him above pleaded, because he says [state the matter of estoppel]. And this the plaintiff is ready to verify; wherefore he prays judgment if the defendant ought to be admitted, contrary to his own acknowledgment and deed [or otherwise], to plead that [here state the matter to which the estoppel relates].

3. *Plea by Matter of Estoppel that the Plaintiff brought an Action against the Defendant for the same Cause of Action, and that the Defendant had Judgment.*[4]

[Commencement, 1 *supra*.] That the plaintiff before this suit brought an action against the defendant in the Court of ——,

[1] Page 408, 3d Eng. ed.
[2] 3 East, 346, 348–351.
[3] Pages 426, 576, 734.
[4] See *ante*, pp. 25 *et seq.* For forms, see Palmer *v.* Temple, 9 Ad. & E. 508; Overton *v.* Harvey, 9 Com. B. 324; Eastmure *v.* Laws, 5 Bing. N. C. 444; Gordon *v.* Whitehouse, 18 Conn. B. 747.

for the said debt [or cause of action] in the declaration mentioned, and thereupon such proceedings were had that afterwards, and before [or after[1]] this suit, it was considered by the judgment of the said court that the plaintiff should take nothing by his writ in respect of the said debt [or cause of action], as by the record of the said court fully appears, and which said judgment is still in full force. [Conclude as *supra*.]

4. *Plea of Estoppel by Verdict as to a Particular Matter adjudicated in a Different Cause of Action.*[2]

In the important case of Outram *v.* Morewood, above referred to, the plaintiff brought an action of trespass against the defendants, Morewood and wife, for digging and getting out coals from a coal mine, alleged by the plaintiff to be within and under his close, called the Cow Close. The defendants pleaded and showed title regularly brought down to them, in right of the wife, from one Sir John Zouch, who in the 39th Elizabeth was seized in fee of the manor of Alfreton, and of certain messuages and lands within the manor, under which title they claimed all the coals under those lands, except such as were embraced under a certain description. And the defendants averred that the coals in question were under the lands of the said Zouch, and were not under any of the premises mentioned in the exception.

The replication to this plea was the important part of the pleadings, and we present it at length. It was sustained upon thorough consideration by Lord Ellenborough. No better precedent of estoppel by verdict can be found. It stated that the defendants ought not to be admitted in their plea to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the making the indenture of bargain and sale in the said plea mentioned, was part and parcel of the said coal mines, veins, and delphs of coals by the said indenture bargained and sold as aforesaid; because heretofore, in Easter term, 32 Geo. 3, the plaintiff impleaded the defendant Ellen, then Ellen Morewood, widow, in a certain plea of trespass, and therein declared against her for that the said Ellen, on the 5th of May, 1792, with force and arms,

[1] *Ante*, p. 21.

[2] See *ante*, pp. 35 *et seq.* Without judgment a special finding does not work an estoppel. Hawks *v.* Truesdell, 99 Mass. 557; Burlen *v.* Shannon, Ib. 200; Lea *v.* Lea, Ib. 493; Thurston *v.* Thurston, Ib. 39; Hubert *v.* Fera, Ib. 198.

broke and entered a certain coal mine or vein of coals of the plaintiff, situate and being within and under a certain part of a certain close of the plaintiff, called Cow Close, or the Great Cow Pasture, in the parish of Alfreton, in the said county of Derby, and dug out of the said coal mine or vein of coals of the plaintiff large quantities of coals, etc., and took and carried away the same, etc.; and that in Trinity term, 32 Geo. 3, the defendant Ellen defended the force, etc.; and as to breaking and entering the said coal mines, etc., under the Cow Close, etc., pleaded that the plaintiff ought not to maintain his said action against her, because the said John Zouch, on the 2d of November, 38 Eliz., was seized in fee of and in the said manor of Alfreton, and divers messuages, lands, and tenements in the parish of Alfreton aforesaid, in the said county, with the appurtenances. And the said Ellen, in and by her said plea in the said former suit, after further setting forth (amongst other things) the said indenture of bargain and sale in the said plea mentioned, in manner and form as the same indenture is in that plea set forth, averred that the said coal mine or vein of coals in the declaration hereinbefore mentioned, at the time of the making of the said indenture of bargain and sale, was part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold as aforesaid. And the said Ellen, in and by her said plea in the said former suit, claimed to be entitled to the said coal mine or vein of coals, in the said hereinbefore-recited declaration mentioned, by the same means, and in manner and form, as the said defendants have above in their said plea in this suit alleged; and that she, the said Ellen, was ready to verify: wherefore she prayed judgment, etc. And the said plaintiff, as to the said plea of the said Ellen in the said former suit, said that he ought not to be barred, etc.; because, protesting that the said Sir John Zouch was not seized in fee of and in the said close in the said hereinbefore-recited declaration mentioned, or of or in the coals, veins, mines, and delphs of coals in or under the same, or any part thereof, as by the said last-mentioned plea was above supposed, he, the said plaintiff, said that the said Ellen, at the said several times when, etc., of her own wrong, broke and entered the said coal mine, etc., within and under the said part of the said close of the plaintiff, called the Cow Close, etc., in the hereinbefore-recited declaration mentioned, and dug out of the said coal mines, etc., large quanti-

ties of coals, and took and carried away the same, etc., in manner and form as the plaintiff had above complained against her; without this, that the said coal mine or vein of coals in the said first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in that plea first mentioned, was part and parcel of the said coal mines, veins, and delphs of coal by the said indenture bargained and sold as aforesaid, in manner as the said Ellen had in the said plea above alleged; and this he was ready to verify: wherefore the plaintiff prayed judgment, etc. And the said Ellen, as before, said that the said coal mine or vein of coal in the said first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the said indenture of bargain and sale in her said plea first mentioned, was part and parcel of the said coal mines, veins, and delphs of coal, by the said indenture bargained and sold as aforesaid, in manner and form as the said Ellen had in the said plea alleged; and of that she put herself upon the country, and the said Joseph did so likewise. And such further proceedings were thereupon had that afterwards, at the assizes at Derby on Saturday the 16th of March, in the 33 Geo. 3, the said issue, so joined, etc., was tried by a jury of the county, etc.; and as to the same issue, the jurors of that jury upon their oath said that the coal mine or vein of coals, in the first count of the said hereinbefore-recited declaration mentioned, at the time of the making of the indenture of bargain and sale first mentioned in the plea of the said Ellen, in the said former suit, were not part and parcel of the said coal mines, veins, and delphs of coals, by the said indenture bargained and sold, in manner and form as the said Ellen had in that behalf in pleading alleged; and they assessed the plaintiff his damages, etc. That such further proceedings were thereupon had that the plaintiff in Trinity term, 33 Geo. 3, recovered judgment, etc., which judgment is still in force, etc. The replication then averred that the plaintiff and Ellen, the defendant named in that record, are the same parties as in this suit, and that the said coal mine or vein of coals in that record mentioned, and the said coal mine or vein of coals in the pleadings in this suit mentioned, are one and the same: wherefore the plaintiff prayed judgment if the defendants ought to be admitted, against the said record, to aver that the said coal mine or vein of coals in the declaration mentioned, at the time of the

making of the said indenture of bargain and sale, was part and parcel of the said coal mine, veins, and delphs of coals, by the said indenture bargained and sold as aforesaid.

5. *Replication by Way of Estoppel to a Plea of Set-off, of a Judgment in an Inferior Court upon the same Matter.*

The plaintiff, as to the defendant's —— plea, says that the defendant ought not to be admitted to plead the said plea, because he says that the now defendant, in the county court of ——, holden at ——, then being a court duly constituted and holden under the statutes relating to the county courts, and then having jurisdiction to hear and determine the plaint hereinafter mentioned, levied a plaint against the now plaintiff for the recovery of the same debt which the defendant now seeks to set off against the now plaintiff's claim, to which that plea is pleaded; and such proceedings were thereupon had in the said court, in the matter of the said plaint, that afterwards it was considered and adjudged by the said court, in the matter of the said plaint, that the now plaintiff did not owe to the now defendant the said debt or any part thereof, and that the now defendant should take nothing by his said plaint in that behalf, and the said judgment still remains in force: wherefore he prays judgment if the defendant ought to be admitted, etc.[1]

6. *Replication to a Plea traversing the Plaintiff's Title to Land, — an Estoppel by a Judgment in Ejectment.*

[Commence as in 5, *supra*.] That on the day and year last aforesaid, the plaintiff, for the purpose of recovering possession of the said land, sued out of the Court of —— a writ of ejectment, directed to the defendant by name, being the person then in possession of the said land, and to all persons entitled to defend the possession of the said land, to the possession whereof the plaintiff by the said writ claimed to be then entitled and to eject all other persons therefrom, commanding the said defendant and the said persons entitled to defend the possession of the said land, or such of them as denied the alleged title of the plaintiff, within sixteen days after service of the said writ to appear in the said Court of —— to defend the said property, or such part thereof as they might be advised, in default whereof judgment might be

[1] For similar *plea* in estoppel, see Eastmure *v.* Laws, 5 Bing. N. C. 444.

signed and they turned out of possession. And such proceedings were thereupon had in the said court, upon the said writ, that by the judgment of the said court it was considered that the plaintiff should recover the possession of the said land; and afterwards, and by virtue of the said judgment, the plaintiff entered into possession of the said land; wherefore the plaintiff prays judgment whether the defendant ought to be admitted, etc.[1]

7. *Plea of Judgment recovered by the Plaintiff in a Superior Court for the same Debt or Cause of Action.*

And the said defendant, by, etc., comes and defends, etc., and says that the said plaintiff ought not to have or maintain his aforesaid action, etc., because he says that the plaintiff heretofore, in the Court of ——, at ——, sued the defendant in an action for the same debt [or cause of action] as in the declaration alleged, and such proceedings were thereupon had in that action that the plaintiff afterwards, by the judgment of the said court, recovered against the defendant $ —— for the said debt [or cause of action], and his costs of suit in that behalf; and the said judgment still remains in force, and this the defendant is ready to verify, etc.: wherefore the defendant prays judgment whether the plaintiff ought to have or maintain his action, etc.

If the judgment was rendered in an inferior court, conform the plea in this respect to 5, *supra*.

The following precedent for a similar plea is given by Mr. Chitty, and is perhaps preferable to the one above given.[2] [Commencement as *supra*.] That the said plaintiff heretofore, to wit, in —— term, A. D. ——, in the Court of ——, at ——, before ——, impleaded the said defendant in a certain plea of trespass on the case on promises to the damage of the said plaintiff of $ ——, for the not performing the very same identical promises and undertakings, and each and every of them in the said declaration mentioned; and such proceedings were thereupon had in the said court in that plea, that afterwards, to wit, in the —— term, the said plaintiff, by the consideration and judgment of the said court, recovered in the said plea against the said defendant $ —— for the damages which he had sustained, as well on occa-

[1] For similar replications, see Doe *v.* Wellsman, 2 Ex. 368; Wilkinson *v.* Kirby, 15 Com. B. 430, 433.

[2] 3 Chitty, Pleading, 929.

sion of the not performing the same identical promises and undertakings in the said declaration mentioned, as for the costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; as by the record and proceedings thereof, still remaining in the said court at —— aforesaid, more fully and at large appears; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. And this, etc. [Conclude as *supra*.[1]]

[1] For form of replication traversing the identity of the causes of action, see Gordon *v.* Whitehouse, 18 Com. B. 747; Palmer *v.* Temple, 9 Ad. & E. 508.

Plea in estoppel of a judgment against the plaintiff in a foreign court, Plummer *v.* Woodburne, 4 Barn. & C. 625; General Steam Nav. Co. *v.* Guillou, 11 Mees. & W. 877; Callendar *v.* Dittrich, 4 Man. & G. 68; Frayes *v.* Worms, 10 Com. B. N. S. 149.

Replication in estoppel to the plea of *nil habuit in tenementis*, of a demise by the plaintiff to the defendant, Wilkins *v.* Wingate, 6 T. R. 62; Curtis *v.* Spitty, 1 Bing. N. C. 15.

Replication in estoppel, to a plea in trespass alleging title in a third party, of a demise by the defendant to the plaintiff. Darlington *v.* Pritchard, 4 Man. & G. 783.

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